

Public Procurement in China: European Business Experiences Competing for Public Contracts in China

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Executive Summary

Overall Public Procurement in China represents well over 20% of China's rapidly growing economy. The regulatory framework governing this enormous and increasing amount of economic activity is fragmented, inconsistent and unevenly implemented.

In its current state, the regulatory framework for government procurement in China is a drag on efficiency and innovation for the Chinese economy as a whole. This represents a missed opportunity the size of the South Korean economy for European business in China.

Still, the implications of China's public procurement system(s) remain relatively unknown or misunderstood outside specialist circles. Given the importance of public procurement for the Chinese and world economies as a whole, it is important that public debate surrounding necessary reform occur within an accurate, focused set of terms. This study aims to make a contribution to this debate.

In this study, the European Chamber describes, analyses and makes recommendations on the "overall public procurement market." This "overall market" refers to the totality of goods, services, projects and works regulated by the Ministry of Finance's Government Procurement Law (GPL) and the National Development and Reform Commission's China Bidding Law (BL).

In the autumn and winter 2010, the European Union Chamber of Commerce embarked upon a study of foreign-invested enterprises (FIEs) competing in China's public procurement markets.

The timing for the study was dictated by two separate and complementary considerations:

- A flurry of regulatory activity from relevant Chinese authorities (Ministry of Finance, National Development and Reform Commission) in 2010 showed that public procurement is high on the government's agenda.
- Progress in the on-going negotiations towards China's accession to the World Trade Organisation (WTO)'s Government Procurement Agreement (GPA).

Based upon in-depth interviews with senior Chamber member company executives, the study also builds upon consultation with government officials, academic experts and legal practitioners. The study draws on this deep reservoir of expertise to identify common challenges at various steps in the bidding process. Sector-specific issues are highlighted in a section on bidding experiences in the windpower generation equipment sector and information and communication technologies.

Common challenges encountered by EU businesses when competing for public contracts included (but were not limited to):

- Difficulty in obtaining timely, accurate information about upcoming projects
- Lack of communication of detailed evaluation criteria for projects
- Trend towards decentralization of tenders leading to more costs, less transparency
- Unfair implementation of public procurement awards
- Unsatisfactory appeals procedures

Based on the analysis contained in the study, and on the on-going work of the European Chamber's Public Procurement Working Group, the European Chamber proposes a number of policy recommendations aimed at reforming China's overall public procurement market.

Recommendations:

1. Ensure all bidders have equal access to information at the start of the bid
2. Enforce transparency and fair evaluation during the tendering process
3. Mind the impact of public procurement on other policies goals
4. Streamline the legal framework for public procurement in China

These recommendations are primarily addressed to Chinese policymakers, as a contribution to the mature, business-minded debate required to improve the fairness, transparency and efficiency of public and government procurement in China.

The Chamber hopes that the facts, trends and challenges uncovered by the study will also be of value to its members and to the international business community in China.

1 Introduction

Since 2004, the European Chamber Public Procurement Working Group has engaged government stakeholders from the Ministry of Finance (MOF), the National Development and Reform Commission (NDRC) and relevant sector ministries.¹

Recently, developments in China's public procurement market have fuelled increased media attention and policy debates in China and abroad. China's massive stimulus spending in 2008 and 2009, "Indigenous Innovation" policies and on-going negotiations towards China's accession to the World Trade Organisation (WTO) Government Procurement Agreement (GPA) have all brought China's public procurement policies into focus. Public procurement has consequently moved up the political agenda. Yet, the impact of these policies on the public procurement market is rarely discussed, giving rise to much speculation and misunderstanding. The European Chamber identified the need to provide a business perspective on the issue.

The purpose of the study is twofold:

1. To increase understanding of how public procurement (and government procurement) works in China, how companies participate in the public procurement market and the challenges they face;
2. To put forward practical suggestions from industry players intended to make public procurement rules more effective in China.

It is hoped that this study will shed some light on the actual issues faced by companies bidding in China and move public procurement from a political discourse to an informed business discussion.

The following sections will first give an overview of the legal framework for government and public procurement in China. The study will then put the discussion in context by putting forward an estimate of the value of China's overall public procurement market. Next, the study will explore a typical bidding process and challenges faced at each step, based on industry feedback. Three sectorial experiences follow and illustrate specific challenges faced in the medical device, information and communication technology (ICT) and windpower sectors. Finally, the study will make recommendations regarding possible reform options.

Before describing the current public procurement system in China, it is worth bearing in mind the unique characteristics of China's public procurement system. As a socialist country, direct and indirect state spending accounts for a larger proportion of economic activity than in most countries and most ministries have significant budgets. In the former command economy, there was no distinction between government and the market; demand was government driven and production was state planned.² All ministries awarded tenders based on their own policies and procurement was seen as an administrative task to control government investment. Authorities were supplied almost exclusively by state owned enterprises (SOEs). Bidding did not exist.

In the opening up of the 1980s, the state council began to view procurement as a means to economic reform and

¹ For further information about the working group, please refer to: European Union Chamber of Commerce in China Public Procurement Working Group, "Public Procurement Working Group Positions Paper," European Business in China Position Paper 2010/2011, September 2010.

² EU-China Trade Project, 'China's accession to the WTO Government Procurement Agreement and Opportunities for Domestic Reform: A study in the light of EU experience', June 2007, page 61

new bidding provisions were introduced by government agencies in charge of works construction.³ After this, various authorities at both local and central level began to issue their own bidding regulations and set up bidding agencies.⁴ This led to a fragmented procurement market with conflicting rules and policies. In 1999, the State Planning Commission (later the NDRC) enacted the Tendering and Bidding Law, introducing market-based bidding mechanisms. Yet while this was in drafting, a parallel initiative for reform was launched and the National People's Congress began to consider government procurement reform. The Government Procurement Law was enacted in 2002 and the Ministry of Finance took charge of implementation of this new law.

Thus public procurement in China has been fragmented, with regulation by different ministries and different levels of government. Such complexity and uneven implementation have increased the risk of corruption in China. Reforming China's public procurement is therefore not only a means of improving economic performance, but of fighting official corruption (see box page 33).

³ Temporary Provisions on the Initiation and Protection of Socialist Competition (Jingsai) of October 1980 by the State Council, followed by Temporary Provisions on Bidding in Works Construction (1984)

⁴ EU-China Trade Project, 'China's accession to the WTO Government Procurement Agreement and Opportunities for Domestic Reform: A study in the light of EU experience', June 2007, page 59

2 The Legal Framework of Public Procurement in China

China currently has two sets of laws governing public tendering:⁵ the Government Procurement Law⁶ (GPL) and the Tender and Bidding Law⁷ (BL).

Broadly speaking, the GPL covers central and sub-central government purchases and the BL regulates all SOE tenders, in particular, large-scale infrastructure projects (such as in construction, aviation, shipping, engineering, architecture, transportation, power and water), as well as large-scale, privately-invested projects for public interest (mainly joint ventures).

Whether a bid is covered by the Government Procurement Law or by the Bidding Law will have major implications on how -- and if -- a foreign-invested company can compete for a bid.

⁵ For the purpose of this study, 'procuring' (and 'procurement') and 'tendering' (and 'tender') will be used interchangeably.

⁶ Standing Committee of the National People's Congress "The Government Procurement Law of the People's Republic of China" promulgated on June 29, 2002, go into effect on Jan. 1, 2003, viewed April 12 2011
http://www.gov.cn/english/laws/2005-10/08/content_75023.htm

⁷ Standing Committee of the National People's Congress "The Bidding Law of the People's Republic of China", promulgated on Aug. 30, 1999, go to effect on Jan. 1, 2000, viewed April 12 2011
http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/12/content_21908008.htm

Figure 1: Key differences between the Government Procurement Law and the Bidding Law⁸

	Government Procurement Law	Bidding Law
Estimated market value	700 billion RMB	Approximately 7 trillion RMB (see next section)
Typical Projects Covered	Construction and maintenance of government buildings, railway, information technology, office equipment, government car fleets, purchases of services for ministerial buildings and non-commercial government entities (not SOE); other purchases are related to relief work, emergencies, geological and other surveys; police, medical and other emergency equipment	Mainly SOEs; renewable energy, power generation and supply, sewage, water supply and public transportation, most large construction projects e.g. All 2008 Olympic construction projects, highways
End-users	Government ministries and agencies at all levels (national, provincial, municipal etc.), public schools and universities, hospitals, and research institutions	State Owned Enterprises, Private Companies
SOEs	Does not apply	Applies
Coverage	Applies to state organs at all levels, public institutions	All public and private bidding
Scope	Supplies, works and services listed in the catalogue or above the threshold (except works covered by bidding law)	Works of public interest, publicly funded works and related supplies or services, R&D
Thresholds	Supplies/Services: Central Government: over 1.2 million RMB Other: over 500,000 RMB Works: Central Gov: over 2 million RMB Other: over 600,000 RMB	Works: over 2 million RMB Works projects: over 30 million RMB
Implementing Body	Ministry of Finance	National Development and Reform Commission and local Development and Reform Commissions, e.g. BDRC for Beijing
Available definition of 'domestic product'	Yes	No
Review and Remedies procedure	Yes	No
Currently covered by the WTO Government Procurement Agreement negotiations	Yes	State owned enterprises were excluded from the scope of GPA coverage. Some (low value) government entities have been included such as Xinhua news agency, Chinese Academy of social sciences and Chinese Banking Regulatory Commission. ⁹ However, these institutions only procure goods and services for their own use – not public projects.

⁸ EU-China Trade Project, 'China's accession to the WTO Government Procurement Agreement and Opportunities for Domestic Reform: A study in the light of EU experience', June 2007, page 146
⁹ List of Entities includes: a) Xinhua News Agency b) Chinese Academy of Engineering c) China National School of Administration d) China Meteorological Administration f) China Banking Regulatory Commission g) China Insurance Regulatory Commission h) State Electricity Regulatory Commission

2.1 The Government Procurement Law

The Government Procurement Law (GPL) was promulgated on January 1, 2003 and is administered by the Ministry of Finance (MOF).

The GPL defines government procurement as procurement of goods, works and services conducted with fiscal funds¹⁰ by state organs at all levels, public institutions and social organizations.¹¹

The GPL applies to all purchases by central and sub-central government but does not apply to projects undertaken by SOEs using public funds or to public goods provided by SOEs such as energy supply or infrastructure projects. Projects that are partially covered by public funds are not regulated by the GPL.

What is covered then? Broadly speaking, it is the goods and services required for government organs to operate. These include office equipment and supplies, construction and maintenance of ministry buildings, purchase and maintenance of ministry vehicle fleets.

In China, infrastructure projects are almost never considered government procurement, even when they are government funded.

Recent Developments

- **Order 618 – November 2009**

The Order, jointly released by MOF, Ministry of Science and Technology (MOST) and NDRC established a catalogue of 'indigenous innovation' products eligible for preferential treatment in tenders governed by the GPL.

- **Draft Implementation Regulations on Government Procurement Law** - January 2010.¹²

The draft regulations clarified certain ambiguous terms that were undefined in the GPL and comments were received from a wide variety of stakeholders. The relevant Chinese departments are conducting further modifications to the implementing regulations and "will seriously take into account opinions and suggestions from all sides".

- **Draft Management Measures for the Government Procurement of Domestic Goods** – May 2010¹³

The draft measures brought some clarity to definitions of "domestic goods" although ambiguity remains regarding the status of value-adding activities within Chinese borders by foreign-invested companies.

Some challenges regarding tendering under the GPL:

1) Catalogue: If a company operates in a sector regulated by the GPL, then the (sub) central government can only procure goods and services from a catalogue of products, works and services maintained and updated by the MOF. The listed products, services and works must be bought through a centralized agency (usually the Central Purchasing Agency or a department central purchasing agency). Companies may have to acquire a series of certifications from Chinese authorities and comply with domestic content requirements in order to comply with the catalogue requirements. According to the draft 12th Five Year plan for the MOF, the ministry plans to amend and correct the catalogue system.

¹⁰ 'Fiscal funds' cover both budgetary (government purchases) and extra-budgetary funds (government sponsored foundations and purchases covered by an administrative service charge).

¹¹ Article 2, GPL

¹² "Notice: SCLAO calls for comments on the Draft Implementation Regulations on Government Procurement Law," Legislative Affairs Office of State Council P.R. China, 11 January 2010, <http://www.chinalaw.gov.cn/article/cazjgg/20100100193904.shtml>

¹³ "Management Measures for Government Procurement of Domestic Goods (Draft for Comments)" Ministry of Finance, Ministry of Commerce, National Development and Reform Commission, General Administration of Customs, viewed April 12 2011, http://www.mof.gov.cn/zhengwuxinxi/bulinggonggao/tongzhitonggao/201005/t20100521_318992.html

2) 'Domestic Product': The GPL gives preferential market access to 'domestic products'. Domestic products are defined as those with over 50% of value added in China. Under the GPL, the Chinese government is obliged to prefer domestic goods, projects, and services.¹⁴ Foreign 'imported goods' may still be purchased under the GPL in exceptional circumstances. Authorities can purchase foreign goods if the domestic equivalent is over 20% more expensive.¹⁵ Most countries give domestic preferential treatment but a margin of 20% is very large and could distort the market and hinder the normal price competition and R&D investment. In practice, this has led to a three tier system of market access (in decreasing order of ease):

1. Domestic products made in China by Chinese-controlled firms;
2. Domestic products made by FIEs;
3. Imported products.

It is important to note that Chinese leaders including Premier Wen Jiabao, have repeatedly assured the international business community that products manufactured in China by FIEs would be treated as 'domestic'.¹⁶

This is an encouraging message. The European Chamber is monitoring the policy's implementation at local levels and is ready to support the government in insuring the application of this positive step.

2.2 The Bidding Law

The Bidding Law was initiated by the National Development and Reform Commission (NDRC) in 1999.

The BL does not specify procuring entities that are covered by the law; instead it sets out different tests, types of purchasing transaction where the BL applies. Therefore, the scope of compulsory coverage is considerably wider than the GPL.

The following public or private projects must be subject to tendering under the BL:¹⁷

1. Projects such as large-scale infrastructure facilities and public utilities involving the social and public interests and public safety (e.g. Olympic installations such as the "Bird's Nest");
2. Projects which are, completely or partly, invested by the state-owned funds or funded through state financing (e.g. an automobile manufacturer –necessarily a joint venture- expanding its production facilities);
3. Projects using loans or aid funds from international organizations or foreign governments. (e.g projects funded by bodies such as the World Bank or Asian Development Bank).

Unlike the GPL, the BL has no specific remedies procedure – if companies have concerns about how a bid is evaluated, often they have little course for satisfactory redress.¹⁸ This is unfortunate given the high total value of contracts awarded under the BL. The NDRC has received comments from a wide variety of stakeholders and is considering appropriate next steps.

Contrary to the BL, there is no official "domestic product" definition. Each ministry sets out local content requirement guidelines as to what constitutes a 'domestic product' – many of them stipulating 70% local content.

The BL leaves a very high level of discretion to procuring entities as to how they define their needs, the exact procedures they follow, the definition and communication of evaluation criteria and if there are appeal options available to unsuccessful bidders. Development and Reform Commission (DRC) – national or local, depending on project size --

¹⁴ Article 10, GPL.

¹⁵ Circumstances where foreign goods can be bought: a) if goods, projects, or services required are unavailable in China, b) if products are unavailable on reasonable commercial terms (domestic goods must be 20% more expensive for this to apply) and c) if the goods, projects and services are procured for use outside China.

¹⁶ European Union Chamber of Commerce in China, Public Procurement Working Group Position Paper 2010/2011

¹⁷ Article 3, Tendering and Bidding Law of the People's Republic of China

¹⁸ See section 4.9 of this publication

approval and guidance is necessary for all projects under the BL.

Recent developments

- **Draft Implementation Regulations on the Tendering and Bidding Law December 2009.**¹⁹ This draft made progress towards standardising bidding procedures, particularly clarifying the preliminary review of a tender's qualification, evaluation and appeals procedures. In 2009, the NDRC requested comments from industry on draft implementation rules for the BL. The draft implementation rules were a welcome initiative, a comprehensive step to help regulate and standardize the implementation of the BL and it is hoped that the implementation rules will standardize procedure and create a viable legal channel for remedies.

Scope of projects covered by the Bidding Law:

The projects regulated by the BL therefore tend to be of larger commercial value and of stronger interest to companies than those regulated by the GPL. Projects covered are diverse, from tenders for construction supplies in private companies to ambitious national projects. In projects by a joint venture where one partner is an SOE, the BL applies. Large size construction and utilities projects are awarded under the Bidding Law.

Almost all public works in China are carried out by government – often provincial or municipal -- establishing a separate entity, ordinarily a special-purpose SOE. The BL covers all tenders by SOEs and it seems that the majority of procuring entities under the BL are SOEs, essentially economic operators owned and controlled by government. The GPL does not apply to SOEs even if these SOEs are using budgetary funds (from the MOF) to conduct their procurement.

Example of the establishment of a SOE for the execution of an infrastructure project in China: The Beijing Metro System

When the Beijing authorities wanted to develop Beijing's metro system, they established the Beijing Mass Transit Railway Operation Corporation Limited, a company owned by the Beijing Municipal Government.²⁰ At the same time, the city also created two subsidiary companies -- the Beijing Mass Transit Railway Operation Corp. Ltd., responsible for operating the subway, and the Beijing Mass Transit Construction Corp. Ltd., in charge of subway construction.

The Three Gorges Dam, construction for the 2008 Olympic games, highways throughout China, metro systems, airport management and energy projects like wind farm development are all undertaken by SOEs. These projects represent a significant amount of public spending in areas usually covered by public procurement rules. However, in China these projects are not considered part of government procurement and they are excluded from the scope of the GPL and instead covered by the BL. Therefore, it is important to widen the scope of debate regarding government procurement to include SOE tendering for public goods/utilities.

Bids under the BL are posted on the chinabidding.com.cn website and other industry and national media designated by the NDRC. Based on the "Decree of the State Development Planning Commission, People's Republic of China No. 4", chinabidding.com.cn is one of the official media for announcing PRC government and public sector tendering notices. Chinabidding.org is an English-language subsidiary website providing tendering notes and information about projects. This centralized platform is a welcome initiative for industry.

¹⁹ Notice: SCLAO calls for comments on the Draft Implementation Regulations on Tendering and Bidding Law, Legislative Affairs Office of State Council P.R. China, 30 September 2009.

²⁰ Formerly known as the Beijing Municipal Subway Company is the Beijing city-owned company that operates 8 lines of the Beijing Subway. viewed April 12 2011
<http://www.bjsubway.com/zjdt/zzjg/2006-12-21/2615.shtml>
http://en.wikipedia.org/wiki/Beijing_Mass_Transit_Railway_Operation_Corporation_Limited

2.3 Other Relevant Chinese Laws

Many industries have additional regulations for tendering that also affect the Chinese overall public procurement (GPL and BL) environment. Pre-qualification for a project may be contingent upon professional qualifications or certifications issued by ministries other than the MOF and NDRC. Such ministries include the Ministry of Housing and Urban-Rural Development (MOHURD), whose circulars and decrees on qualification make it challenging for foreign-invested construction companies, contractors or architects to be accredited and therefore, to compete for public procurement projects. Provisions of other laws, such as the Budget Law, the Contract Law, the Price Law, Administration of Concessions for Urban Utilities Procedures and the Unfair Competition Law will also effect how to BL and GPL are applied. For more information regarding these challenges, please refer to the relevant European Chamber Working Group Position Papers.

“Indigenous Innovation” policies

Indigenous Innovation is a set of industrial policies designed to encourage innovation in China. FIEs support the policy objective of developing the innovative capabilities of the Chinese economy. European companies in particular have been contributing to this goal for years through licensing agreements with Chinese partners and R&D investments.²¹ Indigenous innovation is defined as “enhancing original innovation through co-innovation and re-innovation based on the assimilation of imported technologies.”

Since 2006 and the “National Medium- and Long-Term Plan for the Development of Science and Technology (2006-2020)”,²² new policies have set-up increasingly clear incentives for “indigenous innovation” products.²³ These include state funding of research, but also directly favouring the commercialisation of “indigenous innovation” products. Such policies culminated in the November 2009 with Order 618 released by MOF, NDRC and MOST. Order 618 established a National Indigenous Innovation Accreditation scheme based on a catalogue of products which would enjoy preferential treatment in government procurement. The application procedures effectively precluded FIEs from participating. Following months of consultation with industry on the unintended negative consequences of the policy on investment in R&D in China, Chinese leaders announced that indigenous innovation policies would be de-linked from government procurement. Although this was a major positive development, the international business community remains concerned that discriminatory policies might continue to be enforced locally in spite of national commitments to the contrary.

2.4 The Government Procurement Agreement of the World Trade Organisation

The Government Procurement Agreement (GPA) is a plurilateral agreement between 40 WTO member countries who have agreed to open up their non-defence public procurement markets to each other.²⁴ Suppliers of each GPA member country can participate in the public procurement bids of other GPA member countries and shall be treated no less favourably than local bidders in the award of government contracts.

When a country joins the GPA, the country selects what parts of its public procurement market are covered by the

²¹ European Chamber Business Confidence Survey 2010, ‘More domestic R&D Activity’, page 8

²² “National Medium- and Long-Term Plan for the Development of Science and Technology (2006-2020)”, State Council of the People’s Republic of China, viewed on April 12 2011, http://www.gov.cn/jrzq/2006-02/09/content_183787.htm.

²³ Initiatives such as state-funding of basic research projects, standardisation policies, subsidized patent applications, product catalogues and financing schemes. European Union Chamber of Commerce in China, Information and Communication Technology Working Group Position Paper 2010/2011

²⁴ This is a plurilateral agreement; not all WTO members are bound by it. Here, some WTO members wanted deeper market access than the general WTO membership was willing to sanction so these countries went ahead. They agreed to open up their markets on a reciprocal basis. The agreement is supervised and administered by the WTO and a WTO working group examines a review of the GPA rules but not all WTO members have joined the GPA.

agreements rules ('coverage'). The GPA member countries will list the central and sub-central government entities as well as other entities, such as public utilities, and commit that it will apply GPA rules to these listed entities. This list will also specify the 'threshold' value above which individual procurements are covered by the Agreement. As a general rule, all goods are covered by the GPA, while each country's covered services and construction services are set out in Annexes 4 and 5. Appendix I also includes General Notes, which qualify the coverage accorded under the Agreement.

After defining the part of its markets covered by the GPA rules, a member country must then comply with the GPA rules by ensuring:

- National treatment and non-discrimination for the suppliers of GPA member countries for the procurement of goods, services and construction services based on each country's schedules ("Appendix I")
- Transparency and open procedures and promises to provide the information for procurement
- Domestic review procedures for supplier challenges that must be put in place by all GPA countries
- All GPA members must ensure that their national legislation is consistent with the GPA
- GPA violations will be subject to the WTO Dispute Settlement Body

The agreement is divided into three appendices. The most important part of the offer is in Appendix I, annex 1-3. Here, the countries will list the central and sub-central government entities as well as other entities, such as public utilities, that each country has committed to complying with the Agreement. This list will also specify the 'threshold' value above which individual procurements are covered by the Agreement. As a general rule, all goods are covered by the GPA, while each country's covered services and construction services are set out in Annexes 4 and 5. Appendix I also includes General Notes, which qualify the coverage accorded under the Agreement.

China's Accession to the GPA

After its WTO accession in 2001, China committed to join the GPA 'as soon as possible' and it currently has observer status under the GPA. On 28 December 2007, China submitted its first GPA offer but this was regarded as 'deeply disappointing' by its trading partners.²⁵ On 9 July, 2010 China submitted its revised offer to the GPA.

China's latest GPA offer improved upon the 2007 offer by reducing the implementation period from the initial offer of 15 years to five years and 15 new government entities were covered in the new offer, but these entities represent only a small share of the actual overall public procurement market in China.

Despite these revisions, China's latest GPA offer still fell short of expectations in three main areas:

- **Poor coverage of SOEs and Sub-central entities:** A significant proportion (approx. 80%) of China's government procurement takes place at a local level.²⁶ Yet no local government agencies are included in the list for regulation by the GPA. Similarly, procurement by SOEs for public interest projects represents a very large market with large scale infrastructure projects but the list of included SOEs remains unchanged from the first offer.

Other GPA members have tried to adapt their commitments to ensure meaningful market access. US Procurement is mainly done at federal level, and is covered by the GPA. In Europe, relatively little procurement is done at European (central) level so sub-central coverage is broader to accommodate this and includes states, regions, municipalities and so on. As shown in the "Size of Market" section, the vast majority of overall public procurement is carried by SOEs in China, it is therefore important for these to be included in China's GPA coverage. China has committed that its revised GPA offer would include not just commitments for central government purchases, but also purchases by sub-central entities.²⁷

- **Poor coverage of services and exclusion of several key sectors:** The list of covered services remains extremely limited and the Chinese offer explicitly excludes a number of important sectors, particularly in the utilities sector,

²⁵ "China's accession to the WTO – challenges and a way forward", Ping Wang, *Journal of International Economic Law* 2009, 12 (3) 663-706 at 663

²⁶ WTO Trade Policy Review, China. Chapter 3, page 40, paragraph 66, footnote 49. WTO Document WT/TPR/S/230, World Trade Organization, 4 June 2010

²⁷ Joint Statement released after the January 2011 US State visit of President Hu Jintao to President Barack Obama, viewed April 11th 2011, <http://www.whitehouse.gov/the-press-office/2011/01/19/us-china-joint-statement>

including roads, railways, civil aviation, ports, urban transportation, electricity, water resources, energy, postal services, and telecommunications.

- **Limited access to public contracts in construction:** Coverage of construction services is also very limited, only including the construction of dwellings, hotels and entertainment buildings. For the Chinese construction projects covered by the GPA, few of the permissible construction contracts will satisfy the high threshold proposed by China for application of the GPA. This is hardly a meaningful or realistic offer.

2.5 The Legal Framework for Public Procurement in the EU

In the EU, the consolidation of public procurement regulations is an ongoing process.

The EU procurement framework is based on a clear-cut dichotomy between utilities and the rest of the public sector. The two areas are regulated by two directives that have very similar procedures and transparency measures, but utilities have more choice for advertising their bids and the type of bid to use.

- **The ‘Public Sectors’ directive**²⁸ applies to most contracting authorities – Ministries, Central Government and municipal bodies, as well as part of state and municipal enterprises. The public sectors directive covers all public works, service and supply contracts.
- **The new ‘Utilities Directive’**,²⁹ covers contracting authorities operating in specific fields, such as water, energy (electricity, gas and heat), transport, airport facilities and postal services sectors. This utilities directive covers public undertakings (undertakings over which public authorities may exercise directly or indirectly a dominant influence) and also private sector bodies which provide or operate fixed networks for sectors such as energy, sewerage, mining, public transport. The scope is based on a negative list.

In order to improve the redress and remedies available, the Public Procurement Remedies Directives³⁰ have been revised and a new directive gives the rejected bidders the opportunity to start an effective review procedure at a stage in the process when unfair decisions can still be corrected.³¹

Utility companies also have voluntary access to a system for the external audit (attestation) of their procurement systems and practice; and they and their suppliers or contractors may resolve disputes about the application of the EU rules through a single Community-level system for conciliation.

The EU public procurement rules also apply to all countries that are members of the GPA, EFTA as well as Mexico and Chile. Therefore, the GPA suppliers benefit from the same rights as EU suppliers when competing for public procurement contracts in the EU.

Despite these reform efforts, there remains several different layers of regulations to comply with in Europe before a company from a non EU, non-GPA country such as China can access the procurement market. EU procurement directives have been unevenly implemented into national law because of the different allocation of legal competences between different state bodies and also between different levels of government in federal countries.³² Contracts below certain value thresholds are not covered by the directives but some EU countries also have additional rules about awarding procurement contracts below these specific EU thresholds. Certain service contracts are also subject to lighter requirements.³³

EU and Chinese regulators both attempt to tackle the core issues pertaining to public procurement. Moreover, the scope

28 Directive 2004/18/EC

29 Directive 2004/17

30 Directives 89/665/EEC and 92/13/EEC

31 Directive 2007/66/EC

32 "The comparative study of National Public Procurement Systems across the PPN", Tiziana Bianchi, authority for the supervision of public contracts, Valentina Guidi, Department for the co-ordination of European Union Policies, Dec. 2010, viewed April 12 2011

33 Services such as healthcare, educational and recreational services in annex II B of Directives 2004/18/EC and 2004/17/EC

of the combined EU directives is roughly equivalent to that of the GPL and BL. Three characteristics differentiate the EU approach from the Chinese approach:

- **Transparency:** a clear scope of application of relevant EU laws, access to information and time for companies to bid. For example, procuring entities in several sectors organize public seminars to invite all potential bidders for them to discuss and promote solution options.
- **A united appeals process** for both the public sectors directive and the utilities directive.
- **Level-playing field:** All EU companies and companies from GPA signatory countries (and more: EFTA, Mexico, Chile) enjoy equal rights to compete for public procurement contracts in the EU. This level-playing field means that China's GPA accession will open market access for Chinese companies to public procurement in the world's largest economy.

That said, Chinese companies competing for government contracts in the EU must grapple with a complex legal framework. They encounter national rules and European rules, implemented and administered by different authorities in each member state.

Many of the barriers to competition in public procurement tend to relate to national policies on issues such as market opening (for example in defence and transport), market liberalisation, state aids and remaining barriers to the Single Market. Continued action is needed in each of these areas to achieve a genuine EU Single Market.³⁴ In recognition of this, in 2010 the European Commission launched a comprehensive EU-wide evaluation of the impact of EU procurement policy to guarantee transparency and equal treatment for economic operators. The Commission also launched a review of service procurement in order to consider more extensive regulation of procurement in services. The Commission will evaluate results of these consultations in 2011 and assess whether it effectively achieved its objectives and identify areas where the directives could be improved.

³⁴ "Wood Review Investigating UK business experiences of competing for public contracts in other EU countries", Alan Wood, supported by the Office of Government Commerce, Nov. 2004, p6, viewed April 12 2011
<http://www.ogc.gov.uk/documents/woodreview.pdf>

3 Size of the Public Procurement Market in China

China's overall public procurement market could be worth over 7 trillion RMB. FIEs competing for this market face numerous significant non-market challenges.

In order to highlight the importance of the Chinese public procurement market and to put the rest of the study in context, it is important to estimate the value of China's overall public procurement market.

What is meant by 'overall public procurement market' is: Tendering by the central government, sub-central government and other public entities, SOEs and local authorities, as long as these projects are considered to be of public interest and/or use public funds. In practice, this means contracts regulated by the GPL, plus the majority of those regulated by the BL.

When one attempts to estimate the size of this overall public procurement market, the complexity and fragmentation of China's public procurement regulatory framework becomes apparent. Despite the lack of reliable, accessible information regarding the total size of China's overall public procurement market, it is safe to say at this time that it is very large, and growing larger.

Available information:

The 700 billion RMB official scope of the government procurement market only covers projects administered under the GPL, supervised by the MOF at both central and sub-central level.³⁵ This is only a small portion of the overall public procurement market.³⁶

Examples of projects not included in the official Chinese definition of government procurement:

- The Three Gorges Dam (the largest hydro-electric dam in the world)
- The Bird's Nest, Water Cube and other Olympic venues
- China's high-speed rail network (set to exceed 10000km in 2012)

There are other government procurement projects in key industries like infrastructure, mass transport and some energy projects which are supervised by other ministries under the BL. For example, the public procurement contracts in connection with the construction of the Beijing-Shanghai high-speed railway were worth 220.94 billion RMB from 2008-10 but these were included in the Ministry of Railways' procurement statistics and not included in the MOF's 700 billion RMB figure.³⁷

SOEs, whose purchasing power is even stronger than some government departments are not regulated by the GPL and

35 "National Medium- and Long-Term Plan for the Development of Science and Technology (2006-2020)", State Council of the People's Republic of China, viewed on April 12 2011, http://www.gov.cn/jrzq/2006-02/09/content_183787.htm.

36 WTO Trade Policy Review, China. Chapter 3, page 40, paragraph 66. WTO Document WT/TPR/S/230, World Trade Organization, 4 June 2010

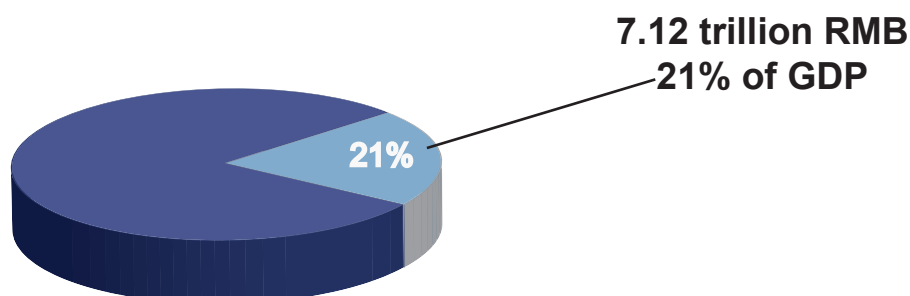
37 "Beijing-Shanghai train takes four hours", Xin Dingding(China Daily), 16 Nov 2010, viewed April 12 2011 http://www.chinadaily.com.cn/china/2010-11/16/content_11553267.htm

therefore are not included in this estimate. The possible size of the procurement market is much, much bigger than the government contracts covered under the GPL.

We have three estimates of the potential size of the procurement market:

1) Estimates from NBS statistics:

**Figure 2: 2009 Chinese government expenditure
as a proportion of China's GDP**



According to data collated from the Chinese National Bureau of Statistics, government spending (excluding military expenditure) came to 7.12 trillion RMB in 2009.³⁸ However, this figure is an inadequate proxy for government procurement. The figure represents government spending overall, including government employee salaries and other running expenses. As such, taking it as a direct indication of government procurement would be a gross exaggeration. Furthermore, this figure ignores projects and procurement carried out by SOEs and in that way significantly underestimates overall public procurement. However, this number does highlight how limited the official 700 billion RMB figure is, as well as the need to look beyond existing available data in order to estimate overall public procurement market size.

2) Proportion of GDP:

The official government procurement (transactions regulated by the GPL) market estimate of 700 billion RMB represents approximately 2% of China's GDP.³⁹ Yet, OECD research indicates that the aggregate average public procurement spending at all levels (including central, provincial and municipal, etc) is 12-20% of a country's GDP.⁴⁰ Therefore, if all public spending was taken into account under a single, complete definition of public procurement, the market size would be far greater.

Applying the OECD global average range to China, China's procurement market could be worth between 4.08 trillion RMB (12% of GDP) and 6.8 trillion RMB (20%).

China has one of the largest state sectors in the world, with large central and sub-central administrations and utilities,

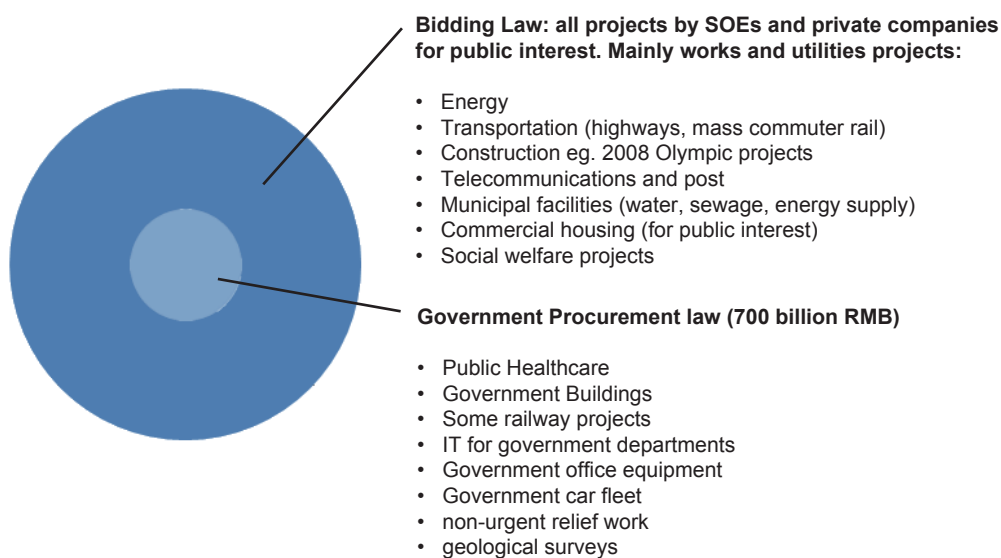
³⁸ Economist Intelligence Unit, data collected from all provincial statistics in China

³⁹ 2009 GDP of 34.0507 trillion RMB, National Bureau of Statistics, viewed on 26th January 2011, http://www.stats.gov.cn/tjdt/zygg/sjxdtzgg/t20100702_402654527.htm

⁴⁰ OECD Publication, "Why is procurement important?", December 2006, Page 3, viewed April 12 2011, <http://www.oecd.org/dataoecd/35/58/37766795.pdf>.

as well as the largest state company sector in the world (some estimate SOEs own 30% of China's total assets⁴¹ and SOEs employ 68.76 million people⁴²). Furthermore, according to the OECD, the proportion of government procurement in the GDP should be even higher in many non-OECD countries than OECD countries.⁴³ Therefore, by this measure, the proportion of China's GDP represented by public procurement is at least in the upper end of the 12-20% spectrum, if not in excess of it. If public procurement's share of GDP was estimated at 20% of China's GDP this would make it worth approximately 6.8 trillion RMB.⁴⁴ Such a number is nearly 10 times the 700 billion estimate, and represents a market larger than South Korea's national economy.⁴⁵

Figure 3: Public Procurement market: 6.8 trillion RMB



3) Fixed Asset investment:

Fixed asset investment (FAI) can provide another indication of the size of the overall public procurement market. FAI (infrastructure and utilities projects) includes projects regulated by the BL such as infrastructure, but also large-scale private projects, and any procurement regulated by the GPL.⁴⁶

In China, FAI represents an unusually large proportion of GDP. This is largely due to the fact that in the past 30

41 "State-owned enterprises in China: How big are they?", Gao Xu, 19 Jan 2011, viewed April 12 2011

<http://blogs.worldbank.org/eastasiapacific/state-owned-enterprises-in-china-how-big-are-they>

42 "China's Employment Situation and Policies", a white paper by the Information Office of the State Council, Xinhua, 26 Apr 2004, viewed April 12 2011
http://www.chinadaily.com.cn/english/doc/2004-04/26/content_326356.htm

43 OECD Publication, 'Bribery in Public Procurement', Page 9, viewed April 8 2011, <http://www.oecd.org/dataoecd/47/11/44956834.pdf>.

44 20% of 34.0507 trillion RMB

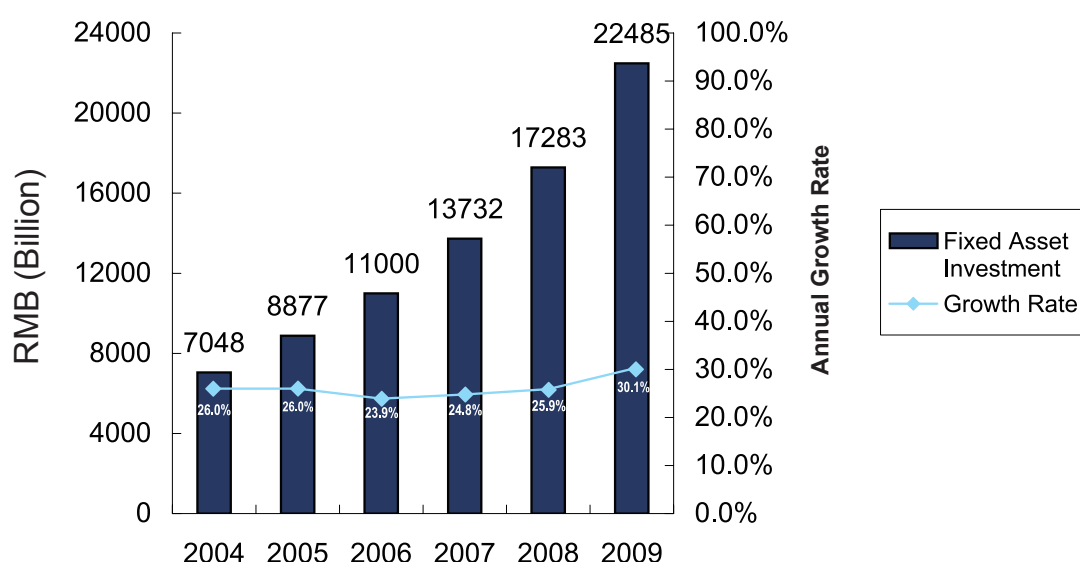
45 6.818 trillion RMB = U.S.\$1,043.62 trillion (at a 2009 average conversion rate of U.S.\$1 = 6.841 CNY viewed on 14 April 2011 at <http://www.irs.gov/businesses/small/international/article/0,,id=206089,00.html>) and in 2009, according to the IMF, South Korea had a nominal GDP of U.S.\$832.512 billion USD (International Monetary Fund, World Economic Outlook Database, October 2010: Nominal GDP list of countries. Data for the year 2009).

46 "Fixed asset Investment" covers investments in capital construction projects in urban and rural areas, investments in real estate development, as well as investments in national defence projects and civil defence projects, and rural household investment. Viewed April 12 2011
<http://www.stats.gov.cn/tjsj/ndsj/2009/indexeh.htm>

years, China's economy has undergone changes on an unprecedented scale characterized by rapid urbanisation,⁴⁷ modernisation and industrialisation.⁴⁸ In 2008-2009, China's economic stimulus plan succeeding in restoring growth by spending 4 trillion RMB in key areas such as housing, rural infrastructure, transportation, health and education and the environment, and an additional 9.6 trillion RMB was made available through monetary policies (many of these loans went to sub-central infrastructure projects executed by SOEs).

According to China's National Bureau of Statistics, 22.485 trillion RMB in 2009 was spent on these fixed assets. This represents 68% of China's 2009 GDP, and is larger than France's, for example.⁴⁹ Much of this 22.485 trillion RMB is public spending on public interest projects, like road, rail and energy projects and as such, it would typically be considered public procurement. In China though, these transactions are not considered part of government procurement.

Figure 4: Fixed Asset Investment 2004-2009



However, this FAI figure is an imperfect proxy for determining the size of China's public procurement market because the total FAI figure includes private investment such as certain real-estate developments. At present, the authors of this study were not able to make satisfactory estimates of the proportion of FAI which was private in origin. Furthermore, by definition, FAI also ignores services which might be procured by government bodies or in the public interest. Nonetheless, it is likely that China's overall public procurement market is likely a significant proportion of the total FAI figure.

In sum, while the market regulated by the GPL totals 700 billion RMB, estimates of the overall market are much higher. The overall public procurement market in China –regulated by the GPL and BL- is estimated to be worth between 7 and 22 trillion RMB. This is an overly wide range, and this study will posit that the overall public procurement market is worth

⁴⁷ To accommodate the influx of people in urban areas, China has invested heavily in urban infrastructure (metro, roads, sewage treatment and energy supply). Increased urbanization has also put pressure on city hospitals and medical support services. From 2010 to 2025, it is estimated by the Ministry of Housing and Urban-Rural Development that 300 million Chinese now living in rural areas will move into cities. The fast pace of urbanization will create at least 1 trillion RMB in annual investment opportunities in building water supply, waste treatment, heating and other public utilities in the cities.

⁴⁸ "Huge road, rail boost in pipeline," (China Daily), viewed April 11 2011, http://www.chinadaily.com.cn/usa/2010-11/09/content_11523642.htm.

⁴⁹ 22.485 trillion RMB = U.S.\$3.286 trillion (at a 2009 average conversion rate of U.S.\$1 = 6.841 CNY viewed on 14 April 2011 at <http://www.irs.gov/businesses/small/international/article/0,,id=206089,00.html>). According to the World Bank GDP database, France had a 2009 GDP of U.S.\$2,649.39 billion. <http://data.worldbank.org/country/france> viewed on April 11 2011.

approximately 7 trillion RMB but that this figure could quite possibly be more, based on the high proportion of FAI in China's economic make-up and on the prevalence of SOE and government investment in Chinese FAI.

Companies interviewed for this study seek access to this wider procurement market by using a realistic definition of China's procurement market, and wanting the same procurement rules to apply to all bidders and to all tenders by central and sub-central government as well as public enterprises (SOEs).

Why is the size of the public procurement market important? With a market of this size, the regulations shaping the public procurement market and their implementation will have a significant economic impact. Permanent exclusion from this market has significant negative impact on the economic operators involved, and limits procuring entity choice.

4 The Typical Bidding Process in China

In order to fully appreciate the issues facing FIEs who compete under the GPL or BL today, the study will now describe the bidding processes and the main challenges encountered by FIEs as they bid for contracts.

The following does not purport to be an exhaustive description of the bidding process for all industries, but rather focuses on stages common to bidding processes for several sectors in which FIEs are active.

This section and the regulatory challenges it highlights is the result of in-depth interviews and consultation with European Chamber member and non member companies in the following sectors: automobile manufacturing, ICT, rail, windpower equipment, engineering, power transmission, healthcare equipment and pharmaceuticals. Additional sector specific steps will not be explored in this section.⁵⁰

4.1 Identification of end-user needs

At this initial stage in the process, the procuring entity, often a (sub)central government or SOE, sets out its preferences. The processes are quite different for procurement regulated by the GPL and by the BL. In both cases though, potential suppliers work to familiarise themselves with goals and preferences of the procuring entity, as well as the applicability of sector-specific technical requirements. A potential bidder will attempt to enter into early technical communications with buyers to better understand their needs.

The lack of transparency in defining end-user needs was a recurring theme across industries and contracts regulated by the GPL and BL.

Government Procurement Law

Challenge 1: Non-transparent drafting of procurement catalogues

Central and sub-central government can only procure goods or services listed in the Central Procurement Catalogue. The catalogue is updated by the State Council at central level and by provincial government at local level. It is unclear how this catalogue is drafted or reviewed. Interviewed companies were not aware of any public consultations during the drafting of national or local government procurement catalogues. The catalogues may also specify certain standards and certificates that a good or service should have in order to be eligible for tender award.

⁵⁰ Further information on sector specific steps, viewed April 12 2011 on <http://www.chinabidding.com/tenders.jhtml?method=tipsDetailFive&docId=1574610>

“If your product is in the catalogue, great. If not, you’re basically shut-out and there is no transparency as to how this or that product got on the list but not yours. Sometimes it can seem like pure protectionism and it’s really frustrating.”

- Interviewed European ICT company

Many of the companies interviewed felt that tenders were often pre-determined; the bid winner was decided well in advance of the official tender outcome or even publication. This perception underlines the effect of a lack of transparency in drafting government procurement catalogues.

Challenge 2: End-user decides where and how to conduct the bid – Decentralised tenders under the GPL lead to higher costs, less transparency

Many participants have experienced an increased volume of tenders conducted at a sub-central level. The increased decentralization of the tendering and approval process makes market entry more difficult for companies.

Decentralisation of procurement under the GPL leads to a fragmentation of the Chinese government procurement market as different sub-central procuring authorities develop their own procedures, procurement catalogues and un-written practices. For government procurement, most provinces have promulgated their own local regulations on government procurement. Although according to the Legislation Law,⁵¹ these cannot be in conflict with the GPL, yet there are many different requirements to be fulfilled. Bidders must also comply with the different procedural and document requirements of these different levels and types of procurement.

With this increasingly decentralised tendering, there is no centralized platform to find out about new GPL tenders. This means that in order to remain aware of current and up-coming projects, companies must allocate more resources to develop and maintain expanding networks of contacts with procuring departments at provincial, municipal and local levels of government.

“The procedures are all roughly similar but some require different forms and certificates than others – you never know. These sound like small differences but when each municipality has its own rules, the time involved in bidding in all these municipalities can multiply.”

- Interviewed European Medical Device Manufacturer

The increased administrative burden of different procedures increases the costs for potential bidders. Some companies said they will no longer be able to afford to bid at so many different levels and they opt to concentrate their efforts at one level. Fewer bidders will reduce competition and as a result, the authorities may have to pay more for their products/ services.

“We couldn’t keep on top of it all (all the different tendering procedures)... We don’t have contacts in all these different municipalities, so we had a choice. Either expand our sales team to target each new municipality or just concentrate on our existing base.”

- Interviewed European Medical Device Manufacturer

While the drawbacks to such regulatory proliferation are clear, it is hard to identify any clear policy rationale for such a trend. On the contrary, it leads to a multiplication of local permits and procedures at the expense of the national economy.

51 Article 63, Legislation Law of the Peoples Republic of China (Order of the President No.3, March 15, 2000)

Example: Decentralised tenders in the medical device market

In the healthcare equipment market, there are no guidelines determining at what administrative level bidding for goods should take place.⁵² This means that some products are tendered for at the provincial level, but in other regions, the same product will be tendered at the municipal level. The supplier company will have to spend time applying for tenders in many different cities in the province, instead of one provincial tender. One study respondent was simultaneously involved in two provincial tenders and 27 municipal tenders in six different municipalities and one tender for a consortium of different municipalities.

The expansion of sub-central bidding and the tendency to develop unique bidding requirements further fragments the market. Such fragmentation protects local special interest groups at the cost of competitors from other cities or provinces and the general population.⁵³

In the 12th Five Year Plan, the Ministry of Finance intends to tackle this issue by publishing guidelines for standardization of government procurement across administrative levels. These guidelines will direct procuring entities towards the correct level at which to procure their goods or services and will create standard terms for product specification. These guidelines would be a very welcome step forward and if adhered to, will provide much clarity, transparency in evaluation and improve accountability.

Furthermore, these guidelines may help China's GPA accession process, ensuring China fulfils the WTO requirement to minimise differences in qualification procedures between different agencies.⁵⁴

Challenge 3: Indigenous Innovation Product Accreditation catalogues: Central... and Local

When it was announced in late 2009, China's National Indigenous Innovation Product catalogue raised serious concerns among the international business community. Following months of discussions with industry stakeholders and EU and US counterparts, Chinese officials committed to keep innovation policies separate from government procurement. During his January 2011 state visit to Washington DC, President Hu Jintao committed to a de-link China's "indigenous innovation" policies from its government procurement.⁵⁵

Officially, China's national indigenous innovation product catalogue has been on hold since spring 2010. However, interviewed companies report that there has been a proliferation of sub-central indigenous innovation catalogues. As of November 2010, the US-China Business Council counted 68 separate such catalogues issued by 22 provincial and municipal governments.⁵⁶ The vast majority of these sub-central catalogues continue to contain discriminatory clauses based on origin of intellectual property (IP). For example, only two of the 523 products listed on the Shanghai catalogue were manufactured by FIEs. As such, provincial government practice contradicts the latest central government public announcement on the matter (April 2010 "Draft Notice on the Launch of the National Indigenous Innovation Work") as well as international commitments made by China's leaders.

Bidding Law:

The end-user, whether a government administration commissioning an infrastructure project or an SOE or private company carrying out a project falling under the BL, starts setting forth its needs at this stage. At this stage, the procuring

⁵² By contrast, for pharmaceutical products, there is a clear guideline directing at which level products should be tendered (Management of Pharmaceuticals Measures).

⁵³ For example, An OECD/DAC Benchmark study found that decentralized procurement procedures in Indonesia have limited competition and reduced accountability and transparency. For more information see also UNPCDC "Snapshot Assessment of Indonesia's Public Procurement System," June 2007, viewed April 11 2011, <http://www.unpcdc.org/media/14358/indonesia%20pilot%20country.pdf>.

⁵⁴ WTO Government Procurement Agreement, Article VIII (g) (ii)

⁵⁵ Joint Statement released after the January 2011 US State visit of President Hu Jintao to President Barack Obama, viewed April 11th 2011, <http://www.whitehouse.gov/the-press-office/2011/01/19/us-china-joint-statement>

⁵⁶ US-China Business Council, "Provincial and Local Indigenous Innovation Product Catalogues," November 2010

entity will often have technical dialogues with potential suppliers in order to better understand available options. Because domestic companies are often in closer contact with the procuring entities, FIEs must make the effort to engage with the procuring entity and understand their needs.

“To win a bid, foreign companies find they need to engage buyers at a very early stage, even one year before the bid, because by the time actual tendering is announced, the winner has already been decided.”

- Interviewed European windpower equipment manufacturer

There are no specific procurement catalogues for projects regulated by the BL. Instead, the procuring entity has full discretion. Requirements for the bid are decided by each buyer. Many SOEs will also require certificates and standards from their suppliers. This means that in certain cases the technical requirements and resulting evaluation criteria can be drafted to suit a favoured tendering outcome. Because of this, interviewed companies expressed strong concern over the risk of NIIP catalogues' application spilling over beyond the scope of the GPL. Such a step would effectively block FIEs from broad swathes of the Chinese market.

Example: Smartcards for the Banking Sector

State-owned banks have started mandating suppliers of certain card solutions be able to provide certificates that are only officially mandated for government procurement. Because these certificates are not accessible to FIEs due to discriminatory ownership requirements, this means that several interviewed companies are losing business regulated by the BL due to the “voluntary” application by SOEs of certificates only mandated for the GPL. The result is that the market share previously won by these global technology leaders is now bestowed upon a few well-connected domestic “champions”.

23

Relation to China's GPA Accession

China has committed that its revised GPA offer would include not just commitments for central government purchases, but also purchases by sub-central entities.⁵⁷ The trend towards increased fragmentation of the government procurement market by diverging local requirements is not supportive of China's commitment to join the GPA.

Recommendations:

- ▲ Introduce unified, standardised directives on the appropriate level at which to conduct procurement (central/provincial/municipal)
- ▲ Desist from applying sub-central Indigenous Innovation Product Catalogues in government procurement (and in procurement regulated by the BL)
- ▲ Develop best practice guidelines for clear standardised rules on minimum information standards, tender and appeals procedure
- ▲ Consider organizing public seminars open to all potential bidders in order to discuss a project's technical requirements.

⁵⁷ Joint Statement released after the January 2011 US State visit of President Hu Jintao to President Barack Obama, viewed April 11th 2011, <http://www.whitehouse.gov/the-press-office/2011/01/19/us-china-joint-statement>

4.2 Studies: Feasibility, Environmental, Financial

The end-user commissions one or more design or research institutes to conduct studies to prepare the project. Typically, the larger the project, the greater the number and variety of studies commissioned. Such studies include feasibility studies, environment impact assessment and studies on the financial requirements and implications of the project.

4.3 Government Approval

The end-user submits a draft proposal including the purpose of the project, the scale of the project, proposed financing of the project as well as preliminary technical requirements and supporting studies.

Under the Bidding Law, the NDRC (or local development and reform commission for smaller projects) examines the end-user's proposal and approves or rejects the project proposal. In certain cases, the NDRC might make revisions to the project proposal to include additional technical requirements (such as mandating certain technical requirements), budgetary requirements, or preferences about the ownership of potential suppliers (JV requirements). Through its project approval authority, the NDRC and its local offices exert significant influence on the direction taken by the proposed project.

For procurement under the Government Procurement Law, the procuring government entity works with MOF, which will review proposed financing plans and ensure that the project is in line with MOF rules and regulations.

At this stage, the project's technical requirements and resulting evaluation criteria have been established.

Recommendation:

- ▲ Set guidelines mandating that technical requirements be drafted in a non-discriminatory, non-preferential manner for bids under the BL and GPL;
- ▲ Avoid misusing technical requirements to discriminate against groups of bidders, for bids under the BL and GPL.

4.4 Selection of Bidding Agency for Projects Regulated by the BL

Under the BL, procuring entities frequently engage bidding agencies to support the bidding process. These bidding agencies are selected by tender. Once selected, the bidding agency will act as the secretariat for the project bid process. The bidding agency will carry out all necessary communications with potential suppliers and will provide the administrative and logistic support necessary to carry out the bidding process. There are hundreds such agencies operating in China at national, local or sector level.

4.5 Publication of the Bid Announcement

Once the procuring entity's needs are identified and the project is approved, a bid announcement is published. The announcement is meant to notify potential bidders about the existence of the project and that bid documents for the projects are to follow. In practice however, these are often vague, incomplete or poorly circulated and make it difficult for a potential suppliers to ascertain whether the project is relevant to them.

4.5.1 Spreading the Word - Communication Channels for Bid Announcements

The vast majority of companies interviewed found that there was no clear platform to find out about new bids.

All companies interviewed devote substantial time and resources to finding out about new tenders. While bids under the BL are usually available at one source (albeit posted on websites at short notice), there are many different sources of tender information for tenders regulated by the GPL.

Government Procurement Law:

There are numerous, disparate sources of information on projects regulated by the Government Procurement Law (GPL). The Ministry of Finance (MOF) designate special media to publish tendering information. The main official source of information about central level tenders under the GPL is www.ccgp.gov.cn (accessed through the MOF home page). However, contracts can be announced on different media for different levels of government (central, provincial, city etc.). MOF also designates different media to announce tenders in different industries, e.g. China Construction Newsletter, for construction and infrastructure-related projects regulated by the GPL. An end-user can choose any one of these nominated media to announce its tender. If an end-user does not publish its bid on one of the nominated media, the end-user is to be fined by MOF.

In order to tackle the problem of too many disparate information sources, MOF tries to ensure that all projects announced on a sub-central level MOF website will also be automatically linked and uploaded on the MOF central website (www.ccgp.gov.cn). In this way, MOF aims to have all sub-central level bids displayed on its central website. This is an encouraging initiative, helping consolidate all the different information sources and hopefully this initiative will soon link all sub-central procurement offers to the central portal and also begin linking other industry sources to this central MOF portal.

Although MOF have made efforts to consolidate different information sources, there is still no single standard, integrated government platform to find out about all new GPL tenders. All interviewed companies active in seeking contracts regulated by the GPL expressed support for MOF's actions to create a single, free-of-charge online information platform for tenders.

Bidding Law:

As with other aspects of tendering under the Bidding Law (BL), procuring entities have a large degree of discretion in the media they choose to announce a bid. Bids can be posted on all or some of the following: an information portal such as chinabidding.com.cn, industry-specific bidding agencies, the procuring entity's website. This makes it very time-consuming for companies to access information regarding the existence, relevance and timeline of up-coming projects.

Although the NDRC has appointed special media to announce public sector bidding notices, none of these commercial and quasi-commercial bodies provides a complete information platform to would-be suppliers.⁵⁸ For example, the NDRC-backed Chinabidding.com.cn (and its English-language sister site chinabidding.org) is one of the more comprehensive information national platforms available. However, interviewed companies found that important sub-central infrastructure projects had not been posted on Chinabidding, highlighting the fragmentation of information sources pertaining to the BL. According to European Chamber member companies, the most commonly used tendering agencies were regional and

⁵⁸ Decree of the State Development Planning Commission, Peoples Republic of China, No.4, July 1, 2001. The appointed media are: China Daily, China Economic Herald, China Construction News and www.chinabidding.com.cn

local government procurement centres.

While information about bids under the BL is available at centralised sources, the bids were often posted online very shortly before the deadline to submit a bid.

Relation to China's GPA Accession

In order to qualify for GPA membership, China must ensure that tender notices are published in the appropriate publications,⁵⁹ in a timely manner, allowing all those who have expressed interest to have a meaningful opportunity to consider and prepare their bid.⁶⁰ Entities must not provide to any supplier information that would preclude effective competition with other suppliers.⁶¹

Recommendations:

- ▲ For bids under the GPL, optimize the single, online information portal aggregating information about all new bids (at all levels) over a certain value. Access to all bidding information on this portal should be updated daily.
- ▲ Register the contracts for GPL and BL (at any level) over a certain value with the relevant ministry portal website (for the GPL) and Chinabidding.com.cn (for the BL). This should be done well in advance of the publication of tendering documents and well before the bid submission deadline. All potential bidders should have appropriate and equal lead time to prepare their bid documents

⁵⁹ Article IX (1), WTO Government Procurement Agreement

⁶⁰ Article IX(5), WTO Government Procurement Agreement

⁶¹ Article VII(2), WTO Government Procurement Agreement

E-procurement

E-procurement involves using the Internet to operate the transactional aspects of requisitioning, authorizing, ordering, receipting and payment processes for the required services or products.⁶² E-procurement websites allow registered bidders to submit their bids to public bodies online. Electronic tender notices, bidding criteria and contract documents are all available for free online to every interested party. This improves efficiency, reduce the required time and substantially cut administrative costs.

Free, online access to all bidding documents increases participation and competition with remote access for bidders from all over China taking part. E-procurement also improves transparency with online availability of all evaluation criteria, evaluations and evaluation reports. Norway has archived contracts and all related documents are available to the press.⁶³ E-procurement also allows the authorities to monitor the progress of the bid, the payments and even link this to the stock control system of the successful bidder company.

Currently, e-procurement seems to be only used on an ad-hoc basis in China, mainly through the BL in the auto and software sectors.⁶⁴ In November 2010, the NDRC launched a pilot e-procurement system to cover some tendering under the BL and the NDRC is investing heavily to create a system that will cover all bidding projects, gathering experts and promoting its use.⁶⁵ For projects administered by the GPL, MOF has introduced some small scale pilot projects covering procurement of goods only. Encouraging progress has also been made in some Chinese provinces.

These initiatives are very welcome steps towards creating a more efficient and transparent system. But, a coordinated and comprehensive use of E-procurement in all public bodies would yield greater savings still. For example, e-procurement in South Korea has proven to decrease the cost of tendering for companies and tender-processing by procuring entities, as well as drastically reducing corruption risk.

Pilot e-procurement programmes begun in different municipalities could be broadened to include further sectors or provinces with the eventual goal of a national roll-out to all types of industries and level of procurement over a certain value threshold. Announcement of a timeline for the full scale implementation of e-procurement in all sectors and levels of government under both GPL and BL would be widely welcome by the business community.

4.5.2 Bid Announcement Timeline

For the companies that manage to obtain information on an upcoming project, the amount of time between publication of a bid and the submission deadline is a determining factor in whether or not a company will be able to bid for a project, or submit a winning bid.

Government Procurement Law:

Under the GPL, companies have 20 days after the tender announcement to submit their bid.⁶⁶ In practice though, there is often a time-lag between the official launch of bidding process and when the information about the bid actually reaching relevant media. The challenge posed by short response times is compounded by the high degree of fragmentation of sources of information on projects.

62 The Chartered Institute of Purchasing & Supply(CIPS) definition of eProcurement

63 'Integrity in Public Procurement', OECD 2007 page 43, last accessed April 6th 2011, <http://www.oecd.org/dataoecd/43/36/38588964.pdf>

64 "Transparency in Government Procurement," World Trade Organisation, 2001, last accessed April 6th 2011, http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#transparency_in_govt_procurement

65 NDRC newsletter on e-procurement, last accessed April 6th 2011, http://fgs.ndrc.gov.cn/gzdt/t20061107_92414.htm

66 Article 35, GPL

Bidding Law:

As with other aspects of the BL's enforcement, there is a lack of consistency in the amount of time provided for companies to prepare bids. Under the BL, companies have 20 days to submit their bid.⁶⁷ However in practice, FIEs are given 12-14 days between announcement of the bid and the submission deadline for bidding documents.

“On Monday, we learn about a bid due in Friday, but those on the inside have been refining their offer for weeks – how can we compete?”

- Interviewed European windpower equipment manufacturer

According to Chinabidding, however, the deadline is even tighter for Chinese companies using the BL system.⁶⁸ In practice, Chinese companies on average have only 7-10 days to submit their bidding documents.⁶⁹

According to interviewed companies, sub-central DRC officials have been responsive to concerns raised by local bidding agencies regarding short timelines and have offered training and some flexibility on notice periods.⁷⁰ In the draft BL implementation rules issued in 2009, the NDRC suggested a time period of five days between the publication of the bidding documents and the submission deadline. This is an unnecessarily short application period. In the EU, minimum notice periods vary from 36 to 52 days depending on the type of tendering procedure.⁷¹ Both Chinese firms and FIEs need more notice to submit bids which best suit buyer needs.

This narrow timeframe is therefore restricting innovation in Chinese companies and fosters the cultivation of extremely close relations with the procuring entity, in turn needlessly creating corruption risks in the system.

Relation to China's GPA Accession

Time limits must be adequate to allow suppliers from other GPA countries as well as other Chinese companies time to prepare and submit tenders before the deadline for submission of tender documents; prescribed time limits range from 25 days (selective bidding) to 40 days (open bidding).⁷² Entities must not provide to any supplier information which would preclude effective competition with other suppliers.⁷³

Recommendations:

- ▲ Apply the same notice period to both Chinese companies and FIEs in the BL
- ▲ Increase the minimum notice period before submission of the bid to 25 days for selective bidding and 40 days for open bidding

4.5.3 Bid Announcement and the Eligibility of Bidders

For projects regulated by the BL, companies will only obtain the information necessary to submit a bid by purchasing the tendering documents for a project. If the firms meet the specified requirements (certifications, accreditations, ownership requirements, etc...), they will then submit their bidding documents in accordance with the requirements stipulated in the

67 Article 24, BL

68 Meeting between European Chamber and Chinabidding, 15 December 2010

69 Ibid

70 For example, changes were made to the notice periods in a bid issued by Jiangsu Overseas Group Corporation, in a bid for X-Ray system (Bid No.: 0675-1040JOC13199)

71 Article XI, WTO Government Procurement Agreement

72 Article XI, WTO Government Procurement Agreement

73 Article VII(2), WTO Government Procurement Agreement

tendering documents and begin preparations for the formal bid submission. In some cases, a company might buy the appropriate tendering documents only to learn that they are not qualified to bid for one reason or another.

In some industries such as windpower generation equipment, projects might require that the bidding process include a minimum number of bidders. In such cases, officials have been known to call companies that would not normally bid – either because they are not interested or know they do not have the specific required qualification -- to ask them to bid in order to meet formal requirements. Companies often comply in hopes for access to useful information in the future.

Recommendation:

- ▲ For contracts under the GPL and under the BL, mandate that procuring entities publish technical requirements for a project, including the rationale for including all technical requirements.

4.6 Bid Documents

As previously noted, there is currently a major lack of transparency in the assessment of technical requirements for projects regulated by the GPL and the BL. Without objective bid evaluations, there is increased risk of impropriety or even criminal activity among procuring entity staff, at the expense of potential suppliers, the state and society at large.

Challenge: Lack of detailed evaluation criteria

“It’s sometimes difficult to get detailed evaluation criteria. If we don’t know what the customer really wants, how can we win the bid?”

- Interviewed European windpower equipment manufacturer

The Government Procurement Law stipulates some general information to be included in bid invitation documents; types and names of the items to be procured, price fixed by contract, qualification requirements and reasons for inviting or selecting suppliers, criteria for bid evaluation and reasons for deciding on the winner of the bid.⁷⁴ But the GPL does not detail what information should be included on the evaluation and scoring criteria.

The GPL stipulates only the general information requirements for the evaluation criteria. It does not specify what details are to be included in the evaluation criteria or scoring.

In practice, under the Bidding Law, each bidding agency set their own standards of information to disclose to potential bidders.

Under the BL there are no minimum standards of information to include in evaluation criteria.

Suppliers under both the GPL and BL have found that often the full evaluation criteria and scoring systems are not available or the published information does not disclose the features of goods, works, or service which the procuring party valued most. Therefore bidders may have little information about the customer’s true preferences when targeting their bid towards the customer. The evaluation criteria and scoring systems are sometimes not disclosed at all. This gives the evaluation committee more discretion when selecting because the bidders will not be able to check whether they awarded the bid based on the evaluation criteria.

Evaluation criteria can even be intentionally weighted towards certain bidders, “picking winners”. There have been cases

74 Article 42, GPL

where officials will weigh the scoring criteria to suit a favoured company. There maybe three or four strong competitors for a specific product and each of them have their specialties. Where an end-user predetermines which company's product to be procured, they can grant higher weights to the special features where the target company has most competitive strength. The bid evaluation process then becomes a mere formality.

Relation to China's GPA Accession:

In order to comply with WTO GPA criteria, China will have to ensure that the entity does not give any one supplier information that would effectively preclude competition in the bid.⁷⁵ The GPA also sets out a list of minimum information requirements to include in the tender notice.⁷⁶ Making full evaluation criteria available at the start of the bid would reduce the opportunities for favouritism during the tendering process, giving Chinese and FIEs an equal understanding of the end-users preferences.

Recommendations:

- ▲ Provide free access to bid documents.
- ▲ Make evaluation criteria and scoring systems available in full with the bidding documents. This could be a requirement of a valid tender.
- ▲ Offer standardised explanations of evaluation criteria terms.
This would be most effective if done at a central level by the ministry responsible for each industry (e.g. MIIT for ICT) to ensure uniform interpretation. These explanations could be used in evaluation criteria for both BL and GPL.
- ▲ Set out a national standard of minimum information to be included in evaluation criteria and scoring system in both BL and GPL. These national standards could be set out by the national ministry for each industry e.g. MIIT sets out the information to be included in all bids in the ICT industry. This would ensure that specific technical terms are given one official definition and interpretation by the central ministry and ensure compliance with WTO GPA minimum information requirements
- ▲ Subject the tender notice and evaluation criteria of high value contracts to a legality check by an independent review and remedies board before publication.

4.7 Bid Evaluation Process

The current regulatory and enforcement loopholes through which bid requirements are either biased in favor of specific potential suppliers and/or are not adequately communicated to potential suppliers further increase the power wielded by bid evaluators. In turn, this increases risks of improprieties (such as favouring of local companies) or even corruption.

Government Procurement Law:

Under the GPL system, a bid will be examined by a procurement officer in the relevant department. Exceedingly vague requirements throughout the government procurement process leave too much discretionary power in the hands of individual officials; unclear weighting of criteria, ambiguous evaluation criteria and ill-defined local content requirements.

“The rules are fine. But it doesn't matter what's on paper, local champions will still win.”

- European windpower generation equipment vendor

⁷⁵ Article XII(2), WTO Government Procurement Agreement

⁷⁶ Article VII(2), WTO Government Procurement Agreement

Bidding Law:

Under the BL, bids are evaluated by a 'bid evaluation committee', usually consisting of representatives of the buyer and experts in the relevant field.⁷⁷ The experts are usually accredited third parties who can evaluate the bid, based on the evaluation criteria and scoring systems given to them by the end-user and/or tendering agency hired by the end-user. At the end of the evaluation, they must write and submit an evaluation report outlining why a certain bid was chosen, based on the criteria set out. These experts must have eight years' professional experience, have senior professional titles and they are generally chosen from extensive databases provided by bidding agencies, but can also be chosen from lists of experts provided by the relevant departments under the State Council or lists provided by the provincial or municipal governments.⁷⁸ According to Chinabidding, many SOEs tend to use the same experts that they have used in the past and often favour retired senior managers from the company.⁷⁹ Such practice fosters the risk of generating conflicts of interest among experts and the potential for a lack of objectivity in the bid selection process.

Recommendations:

- ▲ Detailed evaluation criteria, scoring and procedural rules should be available at the start of each tender. These rules, with some compulsory information in the evaluation criteria should be a pre-condition of a valid tender.
- ▲ Offer standardised explanations of evaluation criteria terms for both BL and GPL. This would be most effective if done at a central level by the ministry responsible for each industry (e.g. MIIT for ICT) to ensure uniform interpretation.
- ▲ Ensure the neutrality of bid evaluation by ascertaining that panellists are third parties. All bidders and bid evaluators should be cross-referenced on government databases for connections to the procuring entity. An independent complaint system could be instated in order to enforce neutrality.
- ▲ Utilise the central database of all experts transparently and all procuring entities under BL could be obliged to use experts from this database.

4.8 Bid Award

After the evaluation, the winning bidder will then receive a 'Notification of Award' and they will start contract negotiations with the end-user. The unsuccessful bidder is often not promptly informed of the award.

As soon as the winning bidder is determined for a project regulated by the BL, the tendering agency is supposed to send a notice of contract award to the winning bidder and inform all unsuccessful bidders of the bidding results.⁸⁰ Unsuccessful bidders often do not receive adequate information about bid awards.

Interviewed companies faced the following challenges regarding bid outcome announcements, especially in cases of unsuccessful bids:

- No information on the bid result itself at the time of award.⁸¹
- No point of contact to address questions about procedures.⁸²
- Only rarely have access to the evaluation report and therefore cannot judge if the bid was evaluated according to the criteria.

In sum, an unsuccessful bidder will often not even know if the bid has been awarded and without the evaluation report, they won't know if criteria and procedures are followed.

⁷⁷ Article 37, Bidding Law

⁷⁸ Ibid

⁷⁹ Meeting between the European Union Chamber of Commerce and Chinabidding, 15 December 2010

⁸⁰ Article 16, 45, BL

⁸¹ Meeting between the European Union Chamber of Commerce and Chinabidding, 15 December 2010

⁸² Bid award announcement: Belt conveyor for coal mine bid announcement tape, Winning bidder: Tape Group Ltd in Hebei Sichuan (Bid No.:0721-210496B00-425 / 3). Here the announcement gave only the name of the winning bid and gave no contact details for the tendering agency or the purchaser.

Recommendation:

- ▲ Notify all bidders of the award of the bid on the day of the announcement and at the same time, supply all bidders (including unsuccessful bidders) a copy of the evaluation report, before signature of the contract.

4.9 Appeals

After the bid has been announced, unsuccessful bidders may feel that the evaluation criteria were not applied correctly. Given the lack of transparency currently found in the definition of technical requirements and the lack of communication of detailed evaluation criteria, a rapid, effective and transparent appeals process is all the more important.

Procurement Reform and the Fight Against Corruption

Corruption diverts public funds from worthwhile development projects, deters investment and undermines public trust in government.⁸³ A lack of comprehensive implementation of the GPL and BL and lack of independent supervision means that the bidding for and awarding of public contracts is not subject to public scrutiny or to independent supervision.

This creates opportunities for corruption in China and foreign as well as Chinese companies have been involved. Poor implementation and supervision also allow public funds to be spent at the discretion of local officials. Recent high profile examples include:

- 430 people have been punished for violating laws and disciplines during a national inspection about the use of China's 4 trillion RMB economic stimulus package.⁸⁴
- Over 230 million RMB of reconstruction funds for the Wenchuan earthquake in Sichuan province have been misused.⁸⁵

Chinese leaders have long made a sustained effort to reduce corruption.⁸⁶ Chinese authorities have carried out a specific examination of corruption in government procurement⁸⁷ and in their annual reports, the National Audit Office expose much corrupt behaviour in government procurement.⁸⁸

In December 2010, the State Council published a white paper on corruption⁸⁹ emphasising the role that a reformed BL and GPL could play in fighting corruption. Authorities pledge improved systems of public announcement and accountability in the GPL and for the BL, authorities pledge to "speed up the establishment of an integrated and standardised tangible market, improve the legal regime to regulate bid invitation and bidding activities."⁹⁰

Often, it is only after the bid award that the other bidders realize that correct procedures may not have been followed.

83 OECD, "Fighting Corruption and Promoting Integrity in Public Procurement," viewed on April 8 2011, http://www.oecd.org/document/35/0,3343,en_2649_34855_38447139_1_1_1_1,00.html

84 "430 punished for misuse of stimulus plan", China Daily, January 5 2011, viewed April 10 2011, http://www.chinadaily.com.cn/china/2011-01/05/content_11794493.htm

85 The National Audit Office (NAO) announced the results of its audit on 72 major post-quake reconstruction projects and the building of 753 schools and urban and rural, which were hit hard by the earthquake on May 12, 2008. "\$34m of Quake Aid Misused, NAO Says," China Daily, January 28 2010, viewed April 1 2011, http://www.chinadaily.com.cn/china/2010-01/28/content_9388130.htm

86 Zhu Rongji, then the Premier of China, once identified government procurement as one of the "Four Major Fields of Corruption". People's Daily (21 February 2002), viewed April 14 2011, <http://www.people.com.cn/GB/shizheng/16/20020221/671044.html>.

87 The Ministries of Finance, of Supervision, National Audit Office, and National Anti-Corruption Bureau conducted a large-scale joint investigation of government procurement in China. WTO Trade Policy Review, Chap 3, P39-40

88 National Audit Office, (Annual Audit Report on the Implementation by 54 Central Units of the Budget of 2008), viewed April 14 2011, http://www.gov.cn/gzdt/200909/01/content_1406693.htm

89 "China's efforts to combat corruption and build a clean government", Information Office of the State Council, December 29, 2010, viewed April 14 2011, http://news.xinhuanet.com/english2010/china/2010-12/29/c_13669383.htm

91 Ibid page 7

Perhaps they made a superior bid or a lower cost bid than the winning bid. In the absence of adequate information, it is often difficult for unsuccessful bidders to understand why they were not awarded a contract.

The majority of companies surveyed felt that evaluation criteria are not objectively applied when assessing the bid, yet only one third have been satisfied when they raise their concerns with the local authorities or tendering agencies.

Some companies felt that they had no one to raise their concerns with (often the case under the BL) and many feared that raising issues with the local official who handled the bid may disadvantage the company in future bids involving this official. In cases when interviewed companies believed that evaluation criteria had not been applied objectively and that remedies were required, most companies approached the responsible local official if they have problems about a bid.

Government Procurement Law:

Challenge: Overly lengthy remedy procedures under the GPL

According to the GPL, MOF are responsible for appeals from government procurement⁹¹ and approximately 300 complaints were filed with MOF last year.⁹²

Under the GPL, if suppliers think they were unfairly excluded from procurement processes or treated in a discriminatory way, they can follow a sequential three step remedy procedure: queries, complaints, and then litigation.⁹³ The three-stage procedure is a protracted, lengthy process.

1. The suppliers may submit queries to the procuring entity, and the procuring entity shall reply in a timely manner.⁹⁴
2. If the supplier is not satisfied with the reply from the procurement bureau, the supplier may appeal by filing a complaint with the Ministry of Finance (MOF) within 15 working days of the query response.⁹⁵ However, there is often no specific department in MOF to deal with complaints filed under the GPL and sometimes officials dealing with complaints will not have adequate specialist training in government procurement practices.
3. If the complainant refuses to accept the decision made by the supervisory authority, then litigation is the last step: the supplier may appeal for administrative reconsideration or lodge a case at the People's Court as administrative litigation.

Overall, this remedies procedure is rarely satisfactory.

Because disputes are usually filed by a bidder after the contract has been awarded to another bidder. At this stage, the end-user will have often already signed a contract with the bid winner and will be keen to begin the contracted work. Therefore, at the end of the procurement challenge procedure, the unsuccessful bidder is unlikely to get a re-evaluation of the whole tender and a chance to bid again. Instead, remedies available to the unsuccessful bidder are compensation and sanctions for the officials involved.⁹⁶

There are also concerns about the impartiality of the decision reached. MOF officials who serve as reviewing body handling complaints are not always independent. The MOF official or their colleague supervised the original bid and they are unlikely to find fault in their decision making process.

91 Article 52, GPL

92 Figures conveyed to the author by MoF officials at a meeting between the European union Chamber of Commerce in China and MoF officials on 24 December 2010

93 Articles 51-58 GPL and set out in more detail in Order No. 22

94 Article 51, GPL

95 Article 54, GPL

96 Article 71-72 GPL

Bidding Law:

Challenge: Lack of formal remedies under the BL

Despite the high value of contracts and projects regulated by the BL, the law does not define any independent appeals procedures.

Article 65 of the BL sets out that a bidder or any other interested party has the right to challenge the decision of the procuring entity. However, the same procuring entity that conducted the bid and set out the rules (the agency) is supposed to enforce the rules and monitor procedural problems. The NDRC has confirmed that agencies have the authority to handle complaints, but that there is not as of yet any formal independent challenge system.⁹⁷ The NDRC has set down the basic requirements for appeals processes in its 'Complaints measure'⁹⁸ yet in practice, agencies implement differing appeals procedures. This is one of the most significant distinctions between the GPL and the BL.

The 2010 Draft Implementation Regulations on GPL suggest that where the BL has no provision to regulate a certain area, the law of the GPL may be applied.⁹⁹ This is a welcome practical interim solution for companies seeking remedies under the BL yet it is not substitute for a clear appeals procedure. This suggestion demonstrates the increasing convergence between GPL and BL rules, perhaps leading a way towards harmonisation in BL and GPL appeals processes.

Relation to GPA Accession:

China has committed to joining the WTO GPA and in order to meet its requirements, China must provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of procedure.¹⁰⁰ This gives aggrieved bidders access to impartial bodies for quick and effective remedial action, including the award of compensation. Under GPA criteria, China must ensure that appeals are heard by an 'impartial and independent review body' free from external influence.¹⁰¹ Under the current GPL system, MOF acts both as a procuring entity and an administrative review organ and this system would violate the GPA.

An independent review and remedies board with harmonized procedures for the BL and GPL would improve transparency and provide appropriate redress for unsuccessful bidders, ensuring transparency and fair bid evaluation.¹⁰²

Recommendations:

Both GPL and BL:

- ▲ Harmonise GPL and BL appeals procedures. The same independent review and remedies board could hear appeals under the GPL and BL.

GPL-specific:

- ▲ Increase number of officials handling appeals and increase their level of qualification

97 An implementing measure has clarified that the tendering agency has the authority to handle complaints for construction projects but neither the BL nor the draft implementation rules for the Bidding Law released in 2009, include any remedy procedures.

Sources: The Notice on the publication of Opinions on Responsibility Division of Administrative Supervision of Bidding Activities by relevant departments in the State Council (34/2000) State Council Office and PRC Draft Implementation Rules of the Tendering and Bidding Law

98 The measure on handling the complaints of Bidding for Construction Projects by NDRC, Ministry of Construction, Ministry of Railway, Ministry of Communication, Ministry of Information Industry, Ministry of Water Resource and General Administration of Civil Aviation, issued and effective on 1 Aug. 2004

99 Article 5, Notice: SCLAO calls for comments on the Draft Implementation Regulations on Government Procurement Law, Legislative Affairs Office of State Council P.R. China, 11 January 2010, viewed April 12 2011
<http://www.chinalaw.gov.cn/article/cazjgg/20100100193904.shtml>

100 Article XX(2), WTO Government Procurement Agreement

101 Article XX(6), WTO Government Procurement Agreement

102 Joint Statement released after the January 2011 US State visit of President Hu Jintao to President Barack Obama, viewed April 11th 2011,
<http://www.whitehouse.gov/the-press-office/2011/01/19/us-china-joint-statement>

- ▲ Impose rotation of procurement officials in order to help curb potential risk of impropriety or criminal activity
- ▲ The ministry responsible for supervising a bid could establish an independent review and remedies board to enforce tendering rules

BL-specific:

- ▲ Draft formal procedure and points of contact to accommodate queries that the unsuccessful bidders may have. Ideally, there could be a three part objections mechanism;
 - I. Objections may be raised at the tendering committee
 - II. Objections may be raised to a cross-departmental committee of the provincial government
 - III. Objections could be raised to a national independent review and remedies board
- ▲ Implement a review and remedies procedure, featuring an independent review and remedies board, with objective practitioners who were not members of the original bidding evaluation committee.
- ▲ Introduce a minimum waiting period between the announcement of public procurement decisions and the signing of contracts. This would begin the day after details of the award decision are sent to all candidates in the tendering process, giving bidders a suitable opportunity to lodge complaints, before the contract is signed, if they felt the decision-making process was flawed.

5 Experiences from Three Sectors

In order to better illustrate how public procurement is conducted in China under the BL, GPL and other laws, the following section provides first-hand experience from FIEs in the windpower equipment, ICT and healthcare sectors in China. These experiences are meant as useful examples in support of the study's general findings and recommendations.

The following sections are based on in-depth interviews and questionnaires received from a broad range of industry players. Companies from many sectors have contributed to this study, such as railway, construction, automotive and pharmaceutical firms. However, windpower generation equipment, Information and Communication Technology (ICT) and healthcare equipment markets were selected as three sectorial examples because they allow for a clear contrast of the different regulatory regimes. Windpower generation equipment procurement is mainly conducted using the BL, the ICT industry uses a mixture of the BL and GPL¹⁰³ and in the healthcare equipment sector, procurement is conducted through the GPL.

Each industry has specific regulations and standards that particularly affect procurement in that sector, but there are also many issues raised in the following examples, which are common to all industries and provide valuable insights into the overall Chinese public procurement framework, as well as pointers towards potential avenues for reform.

5.1 Medical Equipment

Market:

- *Highly concentrated market for advanced medical devices but market for consumable medical goods has many domestic and foreign players*
- *Buyers are Ministry of Health, the People's Liberation Army, sub-central level Ministry of Health officials or individual hospitals*

Challenges:

- *Increasingly sub-central level bidding*
- *Evaluation criteria: little advance details given to bidders and over-emphasis on lowest price*
- *Pricing controls*
- *No access to evaluation reports*
- *Unsatisfactory appeals processes*

In April 2009, China unveiled the healthcare reform plan in April 2009¹⁰⁴, which calls for China to spend 850 billion RMB in order to provide accessible and affordable healthcare to the country's 1.3 billion citizens. This is one of the most ambitious healthcare reforms ever undertaken. The healthcare market, currently estimated at 1.5 trillion RMB, is roughly 5% of the nation's GDP. As the nation moves forward with its universal healthcare coverage plan, the size of China's medical market could exceed 4 trillion RMB per year within 10 years.¹⁰⁵

¹⁰³ Depending on whether the end-user is a government department or an SOE

¹⁰⁴ "China unveils action plan for universal access to basic health care", Xinhua writers Yuan Ye, Jiang Guocheng, 07 April 2009, viewed April 12 2011 http://news.xinhuanet.com/english/2009-04/07/content_11141889.htm

¹⁰⁵ According to a study from management consulting firm, McKinsey & Company, reported in Global Times, 9th of November. ,viewed April 12 2011 <http://www.europeanchamber.com.cn/view/media/fullview?cid=7626#content>

Players:

Bidders: The Medical equipment industry in China is very concentrated at the high end of the market, with 4-5 players providing advanced scanning and imaging equipment. According to the industry participants in our study, companies take part in over 25 bids per year. These bids can have a very high value (over million RMB for a single PET- CT machine, for example). The market for consumable medicines is more dynamic, with many domestic and foreign players. For this section, we have interviewed participants in both markets..

Procuring entities: All hospitals and medical clinics throughout China use procurement to stock their facilities. Tenders can come from a wide variety of sources and at different administrative levels.

Key Sector Public Procurement Issues and trends:

A multiplicity of bidding levels in China's healthcare market:

Public procurement in the medical equipment industry is predominantly regulated by the GPL. Within this GPL framework, there are many different ways to supply medical goods to hospitals in China. Companies can enter into tenders at four main levels of the system:

(i) Peoples Liberation Army Tendering:

The PLA military hospital is the biggest bidding market in healthcare supplies: tenders worth almost 1 trillion RMB annually are organized by the Military General Logistical Bidding Agency.

(ii) Ministry of Health Central Tendering:

The Ministry of Health (MOH) organizes the procurement of:

high-end medical devices for all projects funded by MOH (such as PET-CT machines).

high-cost medical consumables (such as pace-makers and cardiac IVDs).

International Health Exchange and Cooperation Centre of the MOH (IHECC) conducts tendering for large- scale medical devices involving international companies.¹⁰⁶ In order to participate, a company must first obtain a deployment certificate.

(iii) Sub-central tendering:

This occurs at different levels; provincial, municipal and local but most medical equipment procurement is now conducted at provincial and city level.

(iv) Healthcare Reform Spending:

As part of the Healthcare reform plan, the NDRC and the MOH shall buy some low-end equipment (monitoring machines and ultrasound machines). These machines will be distributed throughout China, particularly to rural areas, in an effort to increase the coverage and quality of basic medical care.

Most companies are active all over China, at all levels and the greatest and growing volume of tendering is done at sub-central level (usually provincial and city level).

Moving from a central procurement system to localized tendering:

National Tendering Purchases were cancelled in the 2010 notice announced by the Ministry of Health (MOH).¹⁰⁷ Instead,

¹⁰⁶ Large scale equipment refers to items that are managed by the MOH, as well as items that are purchased for the first time in a province and whose unit price exceeds 5 million RMB, ,Source: Measures on Administration of Deployment and Application of Large Sized Medical Equipment, December 2004, viewed April 12 2011
<http://www.moh.gov.cn/publicfiles/business/htmlfiles/mohbgt/pw10501/200804/f27238.htm>

¹⁰⁷ Ministry of Health, Notice on the Matters Concerning the Centralized Procurement of High Market Value Consumables (MoH No. 12 [2010])

hospitals are now tendering for goods at different sub-central levels. Some tender at provincial level, through the provincial MOH, some through the municipality (city) Ministry of Health offices and some hospitals hire private tendering agencies. There has been a marked increase in the volume of healthcare procurement in these various sub-central levels, particularly city level.

Yet, there are no guidelines determining at what administrative level bidding for goods should take place.¹⁰⁸ This means that some products are tendered for at provincial level, but in another region, the same product will be tendered at city level. This system often gives rise to regional protectionism and its associated problems such as lack of supervision of public budgets and increased bidding costs for bidders.

For example, one respondent was simultaneously involved in 2 provincial tenders, 27 municipal tenders in 6 different municipalities and one tender for a consortium of different municipalities.

This increased sub-central tendering affects both the tender price and the cost of bidding for companies.

Price controls

Health authorities tend to use price controls mainly for the procurement of high end and innovative goods.

Price controls per se are not a problem and exist in several countries. However, Chinese price controls are based only on the production cost of a product. Under this system, companies that become more efficient and lower their production costs will have their product prices set at a lower level. Therefore, using price controls based on production provides no incentive to reduce costs.

The pricing system also ignores life-cycle cost, focusing only on initial production costs. Additional costs that imported goods have such as freight and insurance costs are not included when deciding the admissible mark-up, giving domestic companies inherent price advantage in the bidding. This type of price control system encourages companies neither to improve quality nor to lower their costs, but to keep both at the same level. In the long term, these are wasted costs at a time when China seeks affordable and quality medical care for all. Finally, such price control policies are not consistent with the regulation of a market economy.

Bidding Process:

The Ministry's centralised bidding process generally involves 3 stages:

- 1.Examination of technical specifications by an expert panel;
- 2.Price negotiation supervised by hospitals' selection committees;
- 3.Quantity negotiation with individual hospitals: At this stage, there will be no negotiation on price, only the quantity and delivery details.

Government purchases of medical products generally require in-depth technical dialogue. Surveyed companies therefore reported that end-users in the medical industry mainly use open and negotiated bidding. Companies generally have 2-3 rounds of web-bidding and then 2-3 further rounds of price negotiations with the healthcare buyers. However, at the start of the bidding process some authorities do not inform bidders of how many rounds of tendering there will be – every round could be the last. Believing that it is the last round, bidders offer their absolute lowest price only to find out that there is another round of bidding and that they must bid lower still. In order to plan their bidding strategy, bidders should be informed of how many tendering rounds there will be at the start of bidding.

One interviewed company has encountered up to 3 rounds of web-bidding and 5 rounds of price negotiations.

Some companies also noted the increasing cost of bidding. There are several different fees associated with medical

¹⁰⁹ By contrast, for pharmaceutical products, there is a clear guideline directing at which level products should be tendered (Management of Pharmaceuticals Measures).

procurement: guarantee deposits, administrative fees, participation fees, expert evaluation fees, bid winning service fees, drug quality inspection fees, contract performance guarantees and more. The pricing for these fees is non-standardised and varies between regions. This is an unnecessary burden to the sector as a whole.

Evaluation criteria:

There is much scope to improve the fairness, transparency and consistency of the procurement evaluation system. Companies receive little advance detail about the evaluation and scoring systems to be used by the buyers when assessing the bids. High-level guidelines tend to be issued when the tender notice is published, with further details on the evaluation to follow. Unfortunately, these detailed evaluation guidelines are not always provided and bidders are left with only the high level guidelines as a reference. High-level guidelines include a broad statement about the intended use of the goods, usually some details on price and general guidelines on evaluation criteria and procedure. It is then difficult for vendors to calibrate their bid to suit buyer's preferences. Vague criteria give the evaluating officials more discretion, increasing the risk of corruption and local protectionism.

“Often, all we get are ‘high-level guidelines’. They gave us these general guidelines when the bid was announced and said that detailed evaluation and scoring information would follow soon. Sometimes it does, but not enough detail and sometimes they never issue written scoring and evaluation criteria.”

- Interviewed European windpower equipment manufacturer

Evaluation criteria can also be weighted towards certain bidders, ‘picking winners’. There have been cases where officials will weigh the scoring criteria to suit a favoured company. Where a hospital predetermine which company's product to be procured, their evaluation criteria can grant higher weights to that company's strengths. The bid evaluation process then becomes a mere formality.

Appeals

As discussed above, the GPL provides for formal appeals procedures. However, these are often ineffectual.

Given the tight competitive environment, respondent companies seem unwilling to seek remedies about unfair evaluation of their bids, fearing that procurement officials will remember that they raised concerns and the company might be overlooked in future bids.

When asked about legal remedies, one company responded; “Complain? Never. We need to survive in this market. If we raise concerns, it could ruin our relationship with the official and we will never win a bid again”

In any case, interviewed companies tend to share the position that raising concerns with local officials has rarely changed the outcome of the bid award. Those questioned therefore felt powerless when they encounter problems in the bidding process. Companies had no objective, independent forum to raise their concerns; they simply did not know who to contact about appeals.

Medical Equipment-specific Recommendations:

Trend towards sub-central level bidding:

- ▲ Ensure more clarity and predictability about the correct administrative level for a bid. Best practice guidelines setting out a structured tender process and explaining the appropriate level to bid for different products and devices would avoid the current confusion. Standardised guidelines would also increase transparency and accountability for the MoH who could then easily monitor what funds went to what level of government for which products.

Technical Requirements:

- ▲ Catalogue Classification:
Ensure that local procurement catalogues are harmonised and consistent within one region or province and issue best practice guidelines on catalogue listing for sub-central government.
- ▲ Pricing controls:
Avoid price control measures and allow pricing to reflect the overall investment, provision of training and lifetime technical services.

Tendering procedures:

- ▲ Inform bidders at the start of the tendering process about how many rounds of bidding (web-bidding and price-negotiation) there will be.
- ▲ Disclose all the administrative fees involved in a bid at the start. Standardise these prices and establish local and national databases for regular bidders to avoid repeated registration fees.
- ▲ Increase the use of e-procurement

Evaluation criteria:

- ▲ Broaden the focus of the evaluation criteria, focusing on quality, brand, professional training, after-sales services and the credibility of the company as well as price.
- ▲ Ensure reasoned and sustainable price setting at sub-central level. Publish an explanation of how the tender price was set and avoid below cost selling.

5.2 Information and Communication Technology (ICT)

Market:

- *Hardware, software and service industry, often highly specialized providing solutions such as telecommunication and networking infrastructure, chip cards, software, IT security systems and network management*
- *Buyers are all types of public entities; Central, provincial and local government users as well as SOEs. Therefore tenders in this sector operate under both the GPL and BL.*

Challenges:

- *Selective application of GPL requirements by SOEs*
- *Unique standards and compulsory certification requirements*
- *Mandating voluntary standards*
- *Indigenous Innovation Policies*
- *Information Security policies*

The Market

Bidders: ICT covers a vast range of technologies, services and applications. Firms in the hardware, software and service industry are often highly specialized providing solutions such as telecommunication and networking infrastructure, semiconductors, smart cards, software, IT security systems and network management. It is difficult to generalize across market segments but on average, interviewed ICT companies tend to submit approximately 10-15 bids per year at all levels (central, provincial, municipal and local) and public procurement (GPL and BL) forms a large proportion of their overall sales in China.

Procuring entities: Central, provincial and local government users such as hospitals, schools. SOEs, such as those involved in financial services, telecommunication services or power generation and distribution are also active procurers of ICT goods and services. All these public entities need IT systems to support their operations.

Key Sector Public Procurement Issues and Trends

The public procurement and government procurement of ICT products and services in China presents many of the same challenges as other economic sectors. These challenges include: non-transparent drafting of procurement catalogues, fragmentation of sources of information on new bids, lack of published evaluation criteria, unsatisfactory appeals procedures.

As illustrated below, the process by which procuring entity needs are established is particularly challenging for ICT companies competing for public procurement contracts (GPL and BL).

Determining Procuring Entity Needs

- Unique standards and compulsory certification requirements

Increasingly, companies have to comply with many different product certifications and pass certain standards to be included on the central and sub-central Government Procurement catalogues.

For example, a simple printer/copier machine should attain four certificates to become eligible for government procurement and comply with one additional set of specific office equipment standards.¹⁰⁹

- Company standards:

Large companies (usually SOEs) create their own set of standards, registered with the SAC. In order to win a tender for this company, a supplier must comply with these company standards. These standards are drafted privately by the company and they tend to be much more stringent than the formal government standards. Often, company standards are not publically available and are only accessible once a potential supplier purchases the bidding documents for a given project. Because the companies drafting such standards are often very large, bring shut-out from supplying them can have a significant negative impact on would-be suppliers. These company standards are particularly restrictive to European Chamber member companies aiming to contribute to China's burgeoning smart grid sector.

Incomplete or unpublished standards: Many SOEs attach incomplete standards as pre-conditions to their bids for ICT equipment. As these are often draft standards, bidders have difficulty accessing them.

SOEs tend to use unpublished and voluntary standards, requiring bidders to comply non-transparent and sometimes arbitrary regulations in order to be eligible for a bid. By mandating conformity to voluntary standards (company standards, voluntary industry standards, drafts standards), SOEs create technical barriers to access China's 7trillion RMB procurement market.

- Compulsory Certification requirements for ICT products:

In May 2010, the China National Certification and Accreditation Administration launched the compulsory certification of information security products ('CC-IS'). Thirteen categories of information security products such as smart cards, firewalls, secure databases and anti-spam products, must comply with certain unique Chinese standards in order to be sold to Chinese government bodies procuring under the GPL. The CC-IS itself applies in a non-discriminatory manner to all companies yet, in order to get the CC-IS certificate for some products, a firm must obtain an 'Encryption Testing Certificate' from the Office of State Commercial Cryptography Administration (OSCCA).¹¹⁰ But the OSCCA does not publish its detailed requirements and mandates the use of a 'national algorithm' which FIEs cannot obtain. International firms are therefore excluded from government contracts for 'information security products' such as smart cards, firewalls and secure databases.

Furthermore, IT security solution providers are seriously concerned by signs that certain SOEs have started requiring

¹⁰⁹ A printer should obtain an 'energy efficiency' certificate, an 'eco-label' mark, the product must be then deemed a 'domestic product' to be certified as an 'Indigenous Innovation Product' and then the product must be certified under the Chinese compulsory certification system (CC-IS). The product can now be added to the central procurement catalogue for government purchases. The printer must adopt further 'Information Security Standards for office equipment' in order to be sold.

¹¹⁰ Additional and impossibly onerous OSCCA certification requirements also apply. For more information, please refer to European Business in China Position Paper 2010/2011, Information Security Sub-Working Group Position Paper.

a CC-IS certificate as a prerequisite to participation in their tenders. This spreads the de facto application of the CC-IS to include contracts involving commercial applications in the banking system or in the firewall systems used by Chinese internet service providers. This would effectively mean that the restrictive Encryption Testing Certificate' from the OSCCA is needed for such commercial projects tendered under the BL and would bar FIEs from entire market segments.

- "Indigenous Innovation" policies

As previously discussed, Indigenous Innovation is an industrial policy designed to encourage innovation in China.

Several areas of ICT have been targeted as priority areas for China's indigenous innovation efforts. China has promoted Indigenous Innovation through an array of initiatives such as:

- state-funding of basic research projects,
- standardisation policies,
- subsidized patent applications,
- product catalogues,
- financing schemes.¹¹¹

In practice, these policies involve developing ways to support and encourage companies of Chinese origin to develop core technologies themselves, rather than licensing foreign technologies.

- Sub-central Indigenous Innovation Product Accreditation Catalogue for Government Procurement (NIIP)

At the sub-central level additional, often unique indigenous innovation procurement catalogues are widespread. Local authorities and SOEs release or implement indigenous innovation catalogues, imposing their own, very high, local content requirements, often as high as 70%. For example, this is the case in the context of building convergent public broadcasters, where the necessary hardware and software solutions must be sourced at provincial level. This fragments China's procurement market for high-technology products and hampers the development of innovation capabilities in China by limiting economies of scale, return on R&D investment and therefore R&D spending itself.

- Multi-Level Protection Scheme:

Under the Multi Level Protection Scheme (MLPS) announced by the Ministry of Public Security in August 2007, information systems are classified into 5 levels.¹¹² The MLPS is a technical policy that attempts to protect information systems based on the threat environment they operate in and their perceived value to national security. The MLPS mandates which information security systems and products end-users must source based on their level classification within the scheme. Level 1 represents the least sensitive and Level 5 the most (based on which would cause most damage if the system were breached by an external attack). Systems in Levels 3 and above are considered to be "critical infrastructure" and are not permitted to use information security components that contain foreign intellectual property.¹¹³

This indigenous innovation requirement prevents procuring entities from purchasing the technology solution best suited to their needs, and bars international suppliers from marketing their technologies in China. Affected commercial areas include: Finance, Insurance, Banking, Taxation, Customs, Auditing, Industry & Commerce, Social security, Energy, Transportation, National defence, Public telecommunication, Radio and television transmission, network administration centers and important websites).

Over the past year, government inspectors have been auditing information technology systems and assigning them a level. Government agencies and SOEs must now procure IT solutions that are MLPS-compliant and new tenders increasingly exclude foreign companies based on the origin of their intellectual property (in addition to other requirements such as CC-IS and related OSCCA certification).¹¹⁴ Thus foreign-invested companies are being pushed out of a market on the verge of high growth.

So far, this has impacted most on firewalls, VPN hardware and intrusion detection systems in government procurement products which make up most of the security related hardware sold in China.

¹¹¹ European Union Chamber of Commerce 2010/2011 Position Paper, Information and Communication Technology

¹¹² Ministry of Public Security "Administrative Measures for Information Security Multi-Level Protection Scheme" 2007

¹¹³ Administrative measures, Ibid, article 21, part 1 and 2: "Level 3 and higher Information systems should select information security products that meet the following conditions: ... (2) Product core technology, key components have indigenous Intellectual Property.

¹¹⁴ European Chamber monitoring of government procurement and public procurement websites

- NIIP and China's GPA Accession

China has committed to joining the WTO Government Procurement Agreement and in order to meet the minimum GPA requirements, China cannot discriminate between foreign (GPA member) and domestic suppliers. Under the GPA requirements, China cannot mandate measures used to encourage local development ('offsets'), such as domestic content requirements or technology licensing.¹¹⁵ This would impact on the implementation of Indigenous Innovation and possibly MLPS programmes. Qualification criteria like certification and standards must be limited only to those essential to ensure the firms ability to fulfil the contract and be no less favourable to domestic suppliers.¹¹⁶

Bidding Process:

Although the stipulations of the procurement catalogue determine what products can be bought under the GPL and what standards and certificates are required, very few companies interviewed understood how the catalogue is drafted and updated. More consultation between suppliers (ICT companies) and end-users (government authorities and SOEs) would benefit both. It would provide industry with clearer view of public sector demand in order to improve planning, competition and long-term capacity and public authorities can learn more about the products and services on offer in the market. An emerging practice is to organise seminars together with bidders early in the process.¹¹⁷

Very few ICT companies interviewed understood how the government procurement catalogue is drafted and updated.

Of particular concern to interviewed companies in the ICT sector was the absence of approved definition of 'domestic product' in the context of the GPL. Companies therefore find it difficult to adjust their production in order to be classified as domestic and become approved under the GPL. Furthermore, interviewed companies expressed concern at the practice by certain SOEs to apply parts of the GPL-related "domestic goods" definition to their BL-regulated procurement, or to apply their own unique definitions of the "domestic good."

Recommendations

Determining Procuring entity needs

- ▲ Cease connecting "indigenous innovation" policies to public procurement, in accordance to China's December 2010 JCCT and HED commitments. Give equal treatment to products produced by foreign or Chinese invested enterprises in government and public procurement under NIIP and MLPS.
- ▲ Suspend application of sub-central level NIIP requirements.
- ▲ Create public consultation mechanisms supporting the drafting of procurement catalogues used for public procurement of ICT products and services.
- ▲ Avoid mandating supplier conformity to voluntary, unpublished and company standards by SOEs.
- ▲ Clarify the scope of the CC-IS to ensure projects tendered by SOEs do not require a CC-IS mark.
- ▲ Create an appeals process to give a possibility of redress when such incidents occur.
- ▲ Publish all necessary standards and testing specifications that companies need to apply for the CC-IS

Bid Evaluation

- ▲ Ensure standardised tendering procedures for SOEs and that tendering procedures, catalogues and certificates intended for use in government procurement are not used by SOEs.
- ▲ Disclose all details of the evaluation criteria at the time of bid announcement.
- ▲ Encourage the use of e-procurement

¹¹⁵ WTO Government Procurement Agreement, Article XVI (1)

¹¹⁶ WTO Government Procurement Agreement, Article VIII (b)

¹¹⁷ OECD, 'Integrity in Public Procurement: Good Practice from A to Z', ISBN-978-92-64-02750-3 © OECD 2007, 2007 OECD p34, viewed April 12 2011 <http://www.oecd.org/dataoecd/43/36/38588964.pdf>

5.3 Windpower Equipment

Market:

- 6-7 leading SOEs, a handful of international players and approximately 70 small, new entrants
- Windpower tenders are conducted under the BL
- Two different types of tender contract in windpower sector; for smaller projects, foreign companies bid alone under the BL but for large-scale, national windpower projects, foreign companies bid in partnership with a Chinese firm as developer to the National Energy Agency/ NDRC.

Challenges:

- Evaluation criteria: overly focused on initial turbine price and often include local content requirements
- Access to information about new tenders

Market Background

In 2009 China erected more wind turbines than any other nation and overtook the U.S. as the biggest energy user.¹¹⁸ Half of all funds invested globally in new wind projects in 2010 were invested in China.¹¹⁹ In the draft 12th five year plan, the Chinese government emphasized their commitment to develop new energy industries and the importance of developing low-carbon technologies.¹²⁰ Clearly, China is a key market for all major global wind turbine producers and the renewable industry more generally and this spending boom was conducted through tendering procedures under the Bidding Law.

A unique feature of the windpower procurement market is the use of both regular bidding and concessionary bidding. The concession bidding model (also known as 'BOT' – Build Operate Transfer) is still a competitive tender system, operating under the BL but it has different structure and financing.

In national concession tenders, companies do not bid alone. Instead, companies partner with Chinese developers and together they make a bid for a concession contract to develop wind farms for the local government. The winning developer will finance, design and construct the large-scale wind farm themselves, and the developer will have exclusive rights to operate the windpower facility for a given number of years (usually 20-25 years) in order to recover their investment. Under the concession contract, the regional or national electric grid utilities are obligated to buy the electricity produced and pay the developer at a price set by feed-in tariffs over the 20 years.¹²¹ This program aims to promote the construction of large capacity wind farms and achieving economies of scale.

The players

Suppliers:

China's windpower industry can be segmented into three parts: 6-7 leading SOEs, approximately 70 small, new entrants and a handful of international players. Only the SOEs and foreign-invested companies operate nationwide. There are two main types of activity in the windpower sector; wind turbine generator ('WTG') manufacturing and wind farm developers/power producers.

Foreign companies generally operate as WTG manufacturers. Wind farm developers are usually Chinese majority controlled development companies. These foreign WTG manufacturers can participate individually in local bids but for

118 "China Longyuan, Xinjiang Goldwind Shares Surge After Deutsche Bank Report", Stuart Biggs July 20, 2010, viewed April 12 2011 <http://www.bloomberg.com/news/2010-07-20/china-longyuan-xinjiang-goldwind-shares-surge-after-deutsche-bank-report.html>

119 "Global Wind installations slow in 2010," CNBC website, September 14 2009, viewed October 28 2010, http://www.cnbc.com/id/39887467/Global_Wind_Installations_Slow_in_2010_Bounceback_Expected_in_2011_Bloomberg_New_Energy_Finance_new_wind_power_capacity_additions_leveled_off_in_2010_with_weakness_in_the_US_and_Europe_offset_by_major_growth_in_China

120 NDRC Draft Outline of the 12th Five Year Plan for National and Economic Development, viewed April 12 2011 www.ndrc.gov.cn/yjzx/yjzx_add_jb.jsp?SiteId=46

121 NDRC, Fagaijiage [2006] Document No.7, which states that the tariff of windpower projects shall follow the government guiding tariff

national concession bidding, foreign WTG manufacturers do not directly submit a bid. Instead, they bid in partnership with a Chinese firm as developer or they supply their equipment as part of a package bid by a Chinese development company (SOEs). Therefore, the Chinese wind project developers are the main participant in the national concession bidding process. WTG manufacturers participate in around 20 bids annually, mostly to local government and tendering agencies commissioned by the wind farm developers.

Procuring entities:

The demand side of the windpower market is highly concentrated. For large scale national concession projects (over 50 MW), the national authorities (NEA) tend to award tenders to the 6-7 large SOE development companies and WTG manufacturers supply these development companies. For 'regular' local windpower projects, the Chinese windpower development companies offer the bids and foreign and Chinese WTG suppliers submit their bids directly to these developers.

Key Sector Public Procurement Issues

Determining Procuring Entity Needs

Windpower companies operate under the BL because the BL is used for large infrastructure/energy projects like wind farms. They do not use the procurement catalogue or the Government Procurement Law.

Interviewed companies faced procurement challenges found in other sectors in terms of accessing information on bids, risks linked to indigenous innovation. The following section will explore the particular procurement challenges faced by the sector.

• Over-emphasis on up-front costs harms sector development

Companies interviewed found that tendering criteria focused on installed capacity/KW (i.e. the price of just the machine) and the evaluation did not take into account the whole life cycle cost of the windpower equipment. The purchase price of the machine is just one of the cost elements in the whole process of procuring, maintaining and disposing. A focus on lower initial costs often leads to increased total costs such as maintenance and repair on poorer quality turbines. The heavy focus on initial price at the expense of quality may have led to the increasing reports of faulty wind turbines and frequent turbine failures.¹²² When evaluating the environmental performance of such a good or service, the procuring entity should consider all the costs incurred during its lifetime.¹²³ For windpower equipment, a life cycle cost analysis would examine the productivity – the generated power/KWh (i.e. the total price of generated power), turbine quality and the maintenance and disposal costs of the turbine.

“We are rarely ‘excluded’ from bids but because the evaluation focuses on basic costs and not the long term Life Cycle Costs, we never win the bids.”

- Interviewed European windpower equipment manufacturer

The companies interviewed felt that an assessment of life cycle cost would be for the benefit of power infrastructure, the reputation of windpower energy and would increase the long term quality and competitiveness of domestic companies. It is striking that projects investing in renewable energy; a long term, more sustainable energy source, do not take into account the life cycle cost (LCC) – the cost of the energy in the long run. In effect, the ‘up-front price only’ approach does not represent the best use of public funds and undermines government objectives of increasing the share of renewable energy in China’ overall energy mix.

¹²² For example, at the Shenzhou Windpower Ltd., wind turbines begin to fall apart in January 2010.

¹²³ European Commission Guide to Life Cycle Costing

Example: Life Cycle Cost (LCC) in the EU

The EU has also struggled to effectively compare bids using the life cycle cost model and the experience so far has been only partly successful in some Member States. The EU is considering some adjustments to encourage the LCC model. For example, to encourage a long term view when appraising bids, the procurement contract could include liabilities of the contracting supplier for the long term performance of the power equipment or a guarantee by the supplier that the equipment will function well for a certain timeframe with minimum maintenance costs.¹²⁴

• Localised content requirements

The windpower sector is more affected by local content requirements than most other industries.¹²⁵ Until recently, all wind farm bids had to use 70% local content.¹²⁶ These local content requirements affect both foreign and Chinese WTG manufacturers. A local government can require the production of WTGs in the local municipality or province. Chinese companies from other provinces may also be excluded if they don't have manufacturing facilities in that town/province. In January 2010, the NEA dropped its 70% local content requirement.¹²⁷ This initiative was warmly welcomed by firms in the industry, but some respondents have found that de facto local content requirements remain and provide scope for non-transparent bid selection. Despite the abolition of the 70% local content requirement, all respondents said that they were 'frequently' or 'often' rejected due to local content requirements. There is uneven implementation of the definition of domestic goods.

“Although the [local] content requirements were officially dropped, on the ground we still face content demands. It seems we are never ‘domestic’ enough.”

- Interviewed Windpower equipment manufacturer

• Transparency in scoring and evaluation system

All those interviewed considered complaining about the application of local content requirements and the evaluation of the bid. Most raised their concerns in closed door meetings with the tendering agencies. In all cases, the problem of local content and unclear evaluation requirements lingers. Companies felt that lodging complaints damaged their long term relationship with the tendering agencies. After questioning the lack of transparency in bid evaluations, one respondent was removed from a list of preferred suppliers. The consequences of challenging the bid evaluation are more often less favourable to companies. As a result, fewer companies are willing to raise their concerns.

For offshore wind projects, foreign companies are explicitly excluded. In February 2010, the National Energy Administration and the State Ocean Administration introduced regulations to develop offshore wind projects.¹²⁸ In these offshore wind projects, foreign developers are forbidden from having controlling stakes. Only Chinese firms or Chinese controlled joint ventures can participate as offshore developers.

Bidding Process:

For national concession bids, FIEs generally do not actually submit the bids themselves. The partner wind farm developer is responsible for all the procedural aspects of bidding. The WTG supplier agrees with the developer on the terms of the bid, price plan, and the package. The Chinese developer uses this information for the bidding procedure.

For 'regular bidding', the tendering agency and procedure used will depend on the Chinese developer company's

124 Innovation in Public Procurement Conference, 23 April, 2010, Brussels, viewed April 1 2011, <http://cordis.europa.eu/fp7/ict/pcp/main-outcomes-innovation-in-public-procurement-conference-23-24-04-brussels.pdf>.

125 Local content requirements are understood as any bidding requirements that products/services have to be domestic or contain a certain proportion of products made in China

126 NDRC, "NDRC notice on Management of Windpower Construction", July 4th 2005, viewed April 11 2011, http://www.ndrc.gov.cn/njyt/nyzywx/t20050810_41378.htm

127 People's Daily, "NEA Confirmed Removal on Local Content Rate on Wind Energy. Equipment.", 13 January 2010, viewed on 24 May 2010, viewed April 12 2011, <http://energy.people.com.cn/GB/10758767>

128 State Ocean Administration. "Interim Measures on the Development and Construction of Offshore Wind Farm", 26 February 2010, viewed April 12 2011 <http://www.soa.gov.cn/hyjww/hygl/2010/02/26/1265846969527175.htm>

preference, in compliance with the BL framework. Regional differences in procedure are less apparent in the windpower sector as the procedure to be followed is decided by the wind farm developer, not the local authorities.

All respondents noted that although bidding procedures used in the wind industry tend to be fair, implementation is still a problem. A stark example of the difference between the rules on paper and bidding practice is the prevalence of so-called 'window-dressing' bids. Three bids must be received by the tendering agency to constitute a valid bid¹²⁹ and local authorities have approached companies to submit a 'dummy bid' in order to have three bids for a valid tender. Companies subsequently purchase the bid documents and have submitted a bid, often for projects they have little interest in or little chance of winning. The expectation is that the local authority or agency take this into account when the company next makes a genuine bid.

In the wind industry, some buyer companies are using e-procurement to secure their goods e.g. Huadian has its own tendering website.¹³⁰ Tendering information is posted online and regularly updated. WTG supplier companies can register on the website and apply to bid.

Type of bidding procedures used

As in the medical device sector, all companies questioned preferred negotiated and selective bidding processes because they allowed the time to fully market their product, highlighting all of the products features and discussing more than just price. Negotiated bids are actually quite rare in practice.¹³¹ But selective bidding still has risks of non-transparency. Selective bidding has two stages: 1) pre-qualification stage, selects eligible bidders; 2) the final stage, when tendering documents are published and given to the selected eligible bidders. In the pre-qualification stage, the vendor or agency talk to all industry players to select which companies will be chosen to be in the final evaluation. Only certain companies are chosen for this pre-qualification stage and therefore agencies can still chose its preferred bidders themselves.

“Negotiated Bidding gives us more time with the customer, so we can better understand what they want and explain what our products can do”

- Interviewed European windpower equipment manufacturer

Recommendations:

Broaden the evaluation criteria:

- ▲ Increase focus on the cost of generated energy and life cycle cost, instead of the lowest turbine price. Introduce long term contractual obligations in the procurement contract encourage durable turbines.
Avoid setting restrictions to the rated power of a turbine or any other similar quantitative requirements
- ▲ Improve transparency of the pre-qualification process by providing written evaluation feedback to all interested bidders.
- ▲ Consider introducing internationally agreed testing and certification, quality and reliability assessments. This will ensure that evaluation criteria are interpreted in a transparent and uniform manner.
- ▲ Remove all local content requirements in windpower tendering
- ▲ Allow foreign companies to be qualified to compete for offshore wind projects
- ▲ Encourage the use of e-procurement

¹²⁹ Article 17, Bidding Law

¹³⁰ Huadian Power International Corporation Limited, viewed April 12 2011
<http://www.hdpi.com.cn/st/indexnew.aspx>

¹³¹ Article 20, GPL

6 General Recommendations

Having extensively interviewed European firms active in the government and public procurement markets, this section of the study will offer a series of practical recommendations for the Chinese government to make the public procurement system more transparent, efficient and inclusive.

The recommendations in this section are based on the knowledge and experience of the members of the European Union Chamber of Commerce and other major actors in key procurement industries. They represent a summary of key concerns and hopes for reform and build upon the recommendations made in the European Chamber Public Procurement Working Group's annual Position Papers. The Chamber's goal in providing these recommendations is to promote an open and constructive dialogue with Chinese authorities, particularly in MOF and the NDRC in order to facilitate the coherent reform of China's public procurement system at all levels.

Some of the following measures are relatively straightforward; clear and transparent implementation of evaluation criteria, increased local official training on correct procurement procedure. Yet others, such as increasing coverage of the GPL to include SOE purchases will require deeper structural changes within the central and local government departments but potentially offer greater long-term pay-offs in terms of transparency and efficiency.

“China continues to face challenges in implementing a consistent and transparent approach to procurement across all levels of government”

- World Trade Organisation, Trade Policy Review on China, 2010¹³²

6.1 Ensure all bidders have equal access to information at the start of the bidding process

- ▲ **Create public consultation mechanisms supporting the drafting of procurement catalogues used for government procurement.**
- ▲ **Issue full and detailed evaluation criteria at the time of the bid announcement.** Draft and enforce a set of minimum information standards giving all competitors equal lead time.
- ▲ **Offer standardised explanations of evaluation criteria terms.** This would be most effective if done at a central level by the ministry responsible for each industry (e.g. MIIT for ICT) to ensure uniform interpretation. This could greatly improve the transparency and efficiency of the Chinese procurement market and foster competition and innovation between companies.
- ▲ **Increase minimum time periods to a minimum of 25 days to respond to bid announcements.** These time periods would apply equally to Chinese firms and FIEs. These guidelines could be based on the GPA requirements.¹³³
- ▲ **Establish a central information platform for new bids under the BL.**
- ▲ **Ensure all central, sub-central and industry specific tenders under the GPL are linked to the national MOF portal website.**

¹³² WTO Trade Policy Review, China. Chapter 3, page 41, paragraph 70. WTO Document WT/TPR/S/230, World Trade Organization, 4 June 2010

¹³³ WTO Government Procurement Agreement, Article XI (2) provides for a minimum notice period of 40 days for open bidding and 25 days for selective bidding

6.2 Enforce Transparency and Fair Evaluation during the Tendering Process

- ▲ **Disclose all details of the evaluation criteria at the time of bid announcement.**
- ▲ **Distribute the evaluation report to all bidders (successful and unsuccessful) promptly when the bid award is announced.**
- ▲ **Develop Electronic Public Procurement (E-Procurement)**
Encourage contracting authorities to use centralised electronic systems for timely and transparent announcements of upcoming public tenders and to enable interested parties to register and submit proposals online. Ideally, E-procurement could be operated from the same website as the central platform.
- ▲ **Increase transparency and market competition with respect to price controls in government procurement.**
Tendering agencies and governments should ensure reasoned and sustainable pricing in their tenders. Tender announcements should include some calculations and explanation of how the tender price was set. Fair market competition should be used to set prices.
- ▲ **Publish standardised directives on the correct level at which to conduct procurement under the GPL** (central/provincial/municipal etc)
- ▲ **Mandate use of existing government expert databases to increase transparency in the bid evaluation process.**
Cross reference bidders on government databases, checking for prior relationships with the agency or end-user. Create a central database of all experts and to ensure experts remain impartial, select suitable experts at random from this list
- ▲ **Introduce a standstill period after tender award.**
Implement a standstill period of 7 days after the tender award (and before signature of the contract) to allow unsuccessful bidders time to raise complaints.
- ▲ **Establish independent review and remedies boards to enforce procurement rules.**
Currently, if bidders feel that the evaluation criteria or the procedures were not implemented correctly, there is no satisfactory remedy. Under the GPL, appealing companies' first contact point is the MOF, most likely the same official that has been handling the contested bidding process. Under the BL, each bidding agency is empowered to handle appeals for the tenders it administers. In both cases, there is a need for the creation of an independent, impartial review and remedies board.

An independent review board would provide a platform to objectively address problems encountered when tendering. The review and remedies board could consist of lawyers, academics, expert practitioners, officials from different provinces and experts in architecture, construction, and other relevant sectors. This board would enforce tendering procedure, thereby guaranteeing the quality and legitimacy of the process. Companies could approach this board in confidence without fear of repercussions in their future bids.

6.3 Mind the impact of public procurement on other policies areas

- ▲ **De-link Indigenous Innovation from Government Procurement at all levels.**

Ensure that products are not discriminated against on the basis of the origin of the intellectual property on which they are based, as per President Hu Jintao's January 2011 declarations.

▲ **Encourage green procurement:**

Article 9 of the GPL provides that "government procurement should be conducive to the fulfilment of economic and social targets of the country, including protection of the environment". In the draft 12th Five Year Plan, the Chinese authorities include new energy technologies as part of these targets and emphasise the importance of developing low-carbon technologies.¹³⁴ Evaluation criteria focused on life cycle costs (LCC) and environmental considerations will produce substantial long-term savings in many industries;

- Promote public procurement policies that encourage the development and diffusion of environmentally friendly goods, - - construction works and services
- Allow for environmental considerations in technical specifications, selection and award criteria, and contract performance clauses
- Include LCC as an award criterion to identify the most economically advantageous tenders and favour higher quality solutions

▲ **Refrain from using public procurement for the inappropriate dissemination of standards:**

- Avoid mandating supplier conformity to voluntary and company standards.
- Consider introducing internationally agreed testing and certification, quality and reliability assessments. This will ensure that the criteria are interpreted in a transparent and uniform manner.

▲ **Avoid imposing discriminatory qualification requirements based on Compulsory Certification or company ownership.**

6.4 Streamline the Legal Framework for Public Procurement in China

Initially, the GPL was conceived as a legal framework for government contracts in goods and services and the BL was intended to regulate public contracts for construction.¹³⁵ However, in practice, it is difficult to separate the provision of goods and services from works projects. The existence of two parallel systems of tendering is the source of many inconsistencies and much confusion in the public procurement process, especially concerning the coverage of SOEs. In addressing this dichotomy, Chinese policymakers will be faced with four main prerogatives.

▲ **Implementation and transparency for existing laws:**

In the short-run the priority should be to improve enforcement of existing laws and regulations. As this study demonstrates, there is ample scope for improvement in the processes and procedures involved in government and public procurement in China - in particular, ensuring **uniform enforcement of public procurement regulations** nationwide. The information and technical recommendations contained above aim to indicate possible avenues of reform and also promising paths to follow in order to improve the implementation of the existing policy framework.

▲ **Reform**

It is equally urgent to continue to improve the existing regulatory framework covering government and public procurement in China. The drafting of revised implementation rules for both the BL and GPL in late 2009 and early 2010 was an encouraging development towards improving both laws. The European Chamber played an active role in providing information and feedback in both cases and is ready to provide further support in this complex but necessary process. Policymakers could focus on the above suggestions to improve access to information at the start

¹³⁴ NDRC Draft Outline of the 12th Five Year Plan for National and Economic Development, viewed April 12 2011
www.ndrc.gov.cn/yjzx/yjzx_add_jb.jsp?SiteId=46

¹³⁵ EU-China Trade Project, 'China's accession to the WTO Government Procurement Agreement and Opportunities for Domestic Reform', page 58

of the bid, fair evaluation of the bid and clarify the effect of other industrial policies on public procurement. Reform should benefit Chinese and foreign companies alike and proposals could be guided by the standards set out in the GPA.

▲ GPA Accession

Joining the GPA will open vast international markets for Chinese companies and allow Chinese procuring authorities to benefit from increased choice and increased access to world-leading solutions at lower prices. China and its trading partners have gained immensely from China's joining the WTO. The GPA represents the next frontier in China's integration into the world trading system and would unlock further prosperity for China and its trading partners. The necessary next step in the path to accession is an improved offer which provides comprehensive coverage in terms of:

- entities –SOEs and sub-central government bodies
- types of projects –construction most notably

▲ Consolidation

The eventual inevitable need for a consolidation of the regulatory framework governing government and public procurement has been acknowledged by Chinese leaders in the past. Creating a unified, comprehensive system with new uniform implementation guidelines would foster a level-playing field for companies to compete in and better serve public interests covered in this new complete framework. On the basis of this study, a positive first step would be the harmonisation of procedural elements, most notably appeals procedures. Harmonised procedures and increased transparency provisions would ensure that all public projects are subject to the same degree of transparency and the same basic legal framework.

Given its much wider scope of application, as well as its inclusion of work done in the public interest and/or using public funds, the BL would provide a logical and appropriate umbrella law for overall public procurement in China (public procurement and government procurement).

Such unification would only be a positive development if it improved transparency, created a more level playing field for companies and savings and governance benefits for Chinese society at large.

List of Acronyms

BL	Bidding Law
CC-IS	Compulsory Certification of Information Security Products
FAI	Fixed-Asset Investment
GPA	Government Procurement Agreement
GPL	Government Procurement Law
HED	High-Level Economic Dialogue
JCCT	Joint Committee on Commerce and Trade
MIIT	Ministry of Industry and Information Technology
MOF	Ministry of Finance
MOH	Ministry of Health
NDRC	National Development and Reform Commission
NEA	National Energy Administration
GDP	Gross Domestic Product
MLPS	Multi Level Protection Scheme
SOE	state owned enterprise
WTO	World Trade Organisation

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About the European Chamber

Purpose

As the independent voice of EU business in China, we seek greater market access and improved operating conditions for European companies

Services

- We provide European business with an effective communication and lobbying channel to the European and Chinese authorities, business associations and media
- We ensure key recommendations and lobbying strategies are shaped by business, through our Members' Working Groups
- We monitor China's compliance with WTO and other international commitments which impact on doing business in China
- We support companies with an information platform on business and market conditions in China
- We help companies expand their networks of European and Chinese business contacts
- We promote sharing of knowledge and experience between EU and Chinese business

Principles

- We are an independent, non-profit organization governed by our Members
- We work for the benefit of European business as a whole
- We operate as a single, networked organization across Mainland China
- We maintain close, constructive relations with the Chinese and EU authorities while retaining our independence;
- We seek the broadest possible representation of EU business in China within our membership: large, medium and small enterprises from all business sectors and EU Member States, throughout China
- We operate in accordance with Chinese law and regulations
- We treat all our Members, business partners and employees with fairness and integrity

General Background

The European Union Chamber of Commerce in China was originally founded by 51 member companies based in China on 19th October 2000. The rationale for the establishment of the Chamber was actually based on the need of the European Union and local European businesses to find a common voice for the various business sectors. Eight years since its foundation, the European Chamber now has a total of more than 1600 members in some seven cities: Beijing, Chengdu, Nanjing, Pearl River Delta, Shanghai, Shenyang and Tianjin. The Chamber is recognised by the European Commission and the Chinese Authorities as the official voice of European Business in China.

The European Chamber is a member driven non-profit fee-based organisation with a core structure of 34 Working Groups representing all relevant segments of European business in China. It is registered as a Foreign Chamber of Commerce with the Ministry of Commerce and China Council for the Promotion of International trade.